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SUPREME COURT OF THE UNITED STATES.

No. ~~275~~. 45. 38. 25. 13.
42. 11. 10. 4.

THE SOUTHERN STEAM-SHIP COMPANY OF NEW ORLEANS,
Plaintiffs in Error,

vs.

THE MASTERS AND WARDENS OF THE PORT OF NEW ORLEANS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

GIDEON, Printer.

No. 1.

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No. 275.

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Plaintiffs in Error,

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INDEX.

	Original.	Print.
Bill	1	3
Citation	1	3
Constable's return	2	3
Answer	2	3
Trial of cause	6	5
Notice of judgment	6	5
Constable's return	7	5
Rule for new trial	7	6
Motion for	7	6
Trial of rule	8	6
Appeal bond	8	6
Order granting suspensive appeal	10	7
Notice of appeal	10	7
Constable's return	11	7
Clerk's certificate	11	7
Rules and regulations of pilots	11	7
List of pilots in commission	15	9
Charter of Southern Steamship Co.	16	10

PROCEEDINGS IN SUPREME COURT, STATE OF LOUISIANA.

	Original.	Print.
Entry on minutes (case argued)	33	17
Opinion and decree	34	17
Petition for rehearing	38	19
Entry on minutes—order refusing rehearing	41	21
Petition for writ of error	41	21
Bond for writ of error	43	22
Writ of error allowed by C. J. Mirreck	45	23
Writ of error from Circuit Court U. S.	47	23
Citation in error	48	24
Sheriff's return	49	25

STATE OF LOUISIANA,
Third Justice's Court for the Parish of Orleans.

MASTER and WARDENS, app'ees,
vs.
STEAM-SHIP CHAS. MORGAN and als., app'ts. } No. 11,528.

Bill filed April 1st, 1858.

Office of Master and Wardens, Port of New Orleans,
Feb'y 27, 1858.

Steam-ship Chas. Morgan, Place, from Galveston, capt. and owners,
To the Master and Wardens Dr.,
Fees for Entrance . . . . . $5.
" Surveys . . . . . .

Citation, issued April 1, 1858.

MASTER and WARDENS
vs.
STEAM-SHIP CHAS. MORGAN and als. } No. 11,528.

The State of Louisiana, to Captain Place, and owners of Steamship Charles Morgan; Harris, Morgan & Co., consignees, New Orleans.

You are hereby summoned to appear at the Third Justice's Court for the Parish of New Orleans, within the two days next following the service hereof, to answer the demand made against you by the Master and Wardens, for five dollars, as per bill filed, with interest.

Witness the Hon. Jno. W. Andrews, Justice of said court, New Orleans, this 1st day of April, 1858.

(Signed) R. E. SCHLATIUS, Clk.

Constable's Return.

Served April 1, 1858, a true copy of the within on defendants, by leaving the same at their place of business, in the hands of Mr. J. B. Heno, a free white man, over fourteen years of age, corner of Julia and Levee, he residing there at the time of service, and Messrs. Harris and Morgan being absent at the time of service.

(Signed) J. F. KEARNEY, D. C.

Answer, filed April 9th, 1858.

MASTER and WARDENS
vs.
STEAM-SHIP CHAS. MORGAN and als. } No. 11,528.

Third Justice's Court, Parish of Orleans.

Now come into this Honorable Court, by attorney, the defendants

to the above entitled suit, and for answer to the plaintiffs' demand, say:—

1. That the steam-ship Chas. Morgan belongs to the Southern Steam-ship Company of New Orleans, a company duly incorporated under the laws of Louisiana; and that J. O. Harris, H. R. Morgan, E. J. Hart, and O. B. Payne are the managers of the said company; that the steam-ship Chas. Morgan is a vessel plying regularly between New Orleans and Galveston, and other ports in Texas and elsewhere, transporting, for a valuable consideration, freight and passengers, and the United States mail, to and from all the said ports.

2. That the Act of 1855, page 489, No. 343, "relative to the Master and Wardens of the port of New Orleans, and other acts under which plaintiffs claim certain regulations affecting and imposing restrictions upon commerce with foreign nations and among the several States, thus contravening the eighth section of the first article of the United States Constitution, by which the exclusive power is vested in Congress to regulate commerce with foreign nations, and among the several States, and with the Indian tribes. The said acts are therefore void, as being in conflict with and repugnant to the United States Constitution.

3. The said acts are void, because in violation of the tenth section of the first article of the United States Constitution, wherein it is provided that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports," and "no State shall, without the consent of Congress, lay any duty on tonnage."

4. The said acts are void, because repugnant to the sixth clause of the ninth section of article first of the United States Constitution, which ordains that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another."

5. The said act of 1855, No. 343, is null and of no effect, because the sixth section provides that the Master and Wardens shall be entitled to demand from "each vessel arriving in the port of New Orleans from sea the sum of five dollars, whether they be called upon to perform any services or not;" and these defendants allege that their vessels arrive at this port several times a week, and that in no manner whatever do the Master and Wardens, or either of them, render any services whatever for the defendants, or for their steamers, or officers, or crew.

6. The said act of 1855, No. 343, and other acts under which plaintiffs claim, are null and void, because they contravene the act of Congress of May, 1830, which repeals "all tonnage-duties on ships of the United States, of which the officers and two-thirds of the crews are citizens;" and the defendants aver that on each of their vessels the officers and two-thirds of the crew are citizens. And these defendants further say, that Congress have expressed

their disapprobation of laws similar to the Louisiana Act of 1835, No. 343, by the Act of Congress of March 19th, 1838 (page 19), wherein it is expressly provided, that nothing therein contained "shall authorize the demand of a duty of tonnage on vessels propelled by steam employed in the transportation of passengers.

For which reasons defendants ask that the claim of plaintiffs be dismissed at their costs, and they ask for all general and equitable relief. (Signed) HENRY J. LEOVY,
Att'y for defendants.

May 13, 1858.

This case came on for trial. Hahn, Esq., for plaintiffs; Leovy, for defendants.

"It is admitted that port wardens have a central office; that the vessels made the several trips; that the tonnage is correct, and payment demanded of the captain and agent; and that they have station offices where they can at all times be found if their services are required."—(The Charter of the Company and pilots' rules filed.)

When, after hearing argument of counsel, and for the reasons fully set forth in the case No. 10,789, Master and Wardens *vs.* Martha J. Ward and owners, on the docket of this court, it is ordered that judgment be entered in favor of the plaintiffs and against defendants in solido for five dollars ($5) and costs.

(Signed) JOHN W. ANDREWS, 3d J. P.

Notice of Judgment.

Issued May 14th, 1858.

The State of Louisiana, Third Justice's Court
for the Parish of Orleans.

MASTER AND WARDENS
vs. } No. 11,528.
Steamship CHARLES MORGAN et als.

To Captain Place and owners of steamship Charles Morgan and Harris & Morgan, consignees:—

You will please take notice, that, on the 13th day of May, 1838, judgment has been rendered against you for the sum of five dollars and costs in the above entited suit.

Witness the Honorable John W. Andrews, justice of said court.

New Orleans, this 14th day of May, 1858.

(Signed) JOHN W. ANDREWS, 3d J. P.

Constable's Return.

Served, May 15th, 1858, a true copy of the within, on the defendants, by leaving the same in the hands of their agents, corner of Julia and Levee streets, in the hands of their clerk, a free white

man over 14 years of age, defendants being absent at the time of service. (Signed) JOHN T. KEARNY, D'y Constable.

Rule for a New Trial.

Filed May 17th, 1858.

State of Louisiana, Third Justice's Court for the Parish of Orleans.

MASTER and WARDENS vs. STEAM-SHIP CHAS. MORGAN and als. } No. 11,528.

On motion of Henry J. Leovy, attorney for defendants in the above cause, it is ordered by the court that plaintiffs show cause, on Thursday, the 20th of May, 1858, at twelve o'clock, why a new trial should not be granted, for this reason, that the decision is contrary to the law and to the evidence, and for the further reason that this Honorable Court has rendered no decision on the question presented in the answer, and numbered 3, 4, 5 and 6; and because, in all the cases now before the court in which these parties are defendants, no proof is made that any services whatever have been rendered to defendants.

May 20th, 1858, this rule came on for trial—Hahn for plaintiff, Leovy for defendants—when, after hearing argument of counsel, it is ordered that this rule be dismissed, and a new trial refused.

May 24th, 1858, Appeal bond, filed May 24th, 1858.

The State of Louisiana, parish of Orleans, city of New Orleans.

Know all men by these presents, that we, the Southern Steamship Company and Maurice Lenihan, are held and firmly bound unto the Master and Wardens, their executors, administrators, and assigns, in the sum of twenty-five dollars, and for the payment whereof we bind ourselves, our heirs and administrators, firmly by these presents. Subscribed and dated this 24th day of May, 1858.

Whereas, the above bounden Steam-ship Company have this day appealed from a final judgment rendered by John W. Andrews, third justice of the peace for the parish of Orleans, against them in favor of said Master and Wardens, for the sum of five dollars and costs—

Now, therefore, the condition of the above obligation is such, that if the said Southern Steam-ship Company shall prosecute their said appeal with effect, and shall pay or perform any judgment that may be rendered thereon against them, or if the execution that may issue on such judgment should be satisfied out of their proper goods and chattels, lands and tenements, then and in such case the obligation to be void, or else to remain in full force and effect.

(Signed) HARRIS, MORGAN, per,
For themselves and Southern Steam-ship Co.

(Signed) MAURICE LENIHAN.

Signed, sealed, and delivered in presence of—

(Signed) R. E. SCHLATIUS.

Order.

Let a suspensive appeal be granted in this cause, returnable to the Supreme Court of Louisiana on the second Monday of June, 1858.

New Orleans, 24th May, 1858.

(Signed) ARTHUR SAUCIER, 3d J. P.

Notice of Appeal, issued May 25, 1858.

MASTER and WARDENS
vs.
STEAM-SHIP CHAS. MORGAN and als. } No. 11,528.

Third Justice's Court for the parish of Orleans, the State of Louisiana, to Master and Wardens, greeting:—

Whereas, defendants have appealed from a final judgment rendered in the above suit, which appeal is returnable in the Supreme Court of Louisiana, on the second Monday of June, 1858, you are hereby commanded to appear then and there, to answer to said appeal.

New Orleans, this 25th day of May, 1858.

Witness the Hon. A. Saucier, Justice of said court.

(Signed) R. E. SCHLATIUS, Clk.

Constable's Return.

Served, June 4th, 1858, a true copy of the within on plaintiffs, by leaving the same at their office, corner of St. Charles and Commercial Alley, in the hands of one of the plaintiffs, Captain Landry, personally.

(Signed) J. F. KEARNEY, D'y C.

I hereby certify the above and foregoing to be a true and correct transcript of all the proceedings and judgment of record in the above entitled case, as well as of all the original papers and documents on file in said case.

New Orleans, June 11th, 1858.

ARTHUR SAUCIER, 3d J. P.

Original Documents annexed to the transcript in this cause.

Filed May 12th, 1858. Signed A. W. A.

Rules and regulations for the pilots of the port of New Orleans.

Central Office, Board Port Wardens, New Orleans,
Aug. 1*st*, 1857.

At a regular meeting of the Board of Wardens, held this day, the following rules and regulations for the government of the pilots of the port of New Orleans were adopted:—

Article 1. It shall be the duty of the board of examiners as soon as practicable, after the official promulgation of these rules and

regulations, to deliver to each and every person holding a commission, a branch pilot, a printed copy of the same.

It shall be the duty of the pilots in commission to have six good substantial sea-going vessels, of not less than (50) fifty tons burthen, schooner rigged, which they shall keep in good running condition, four of which shall be kept cruising at sea, between S. W. Pass and South Point, South Point and N. E. Pass, Northeast Pass and Pass à l'outre, with a sufficient crew on board of each to navigate the same, independent of the pilots that may be on board; each boat shall have on board on leaving the several stations for a cruise, not less than six pilots, and shall not return until all of them have been put on board of inward bound vessels, except in case of stress of weather, or for some other good or sufficient reason which shall be stated in their quarterly report. One boat shall be kept constantly at anchor on the bar at S. W. Pass, and one also at Pass à l'outre, with the jack flying at the day time and a signal lantern at night.

Article 2d. It shall be the duty of the pilots to select from their number two competent persons to act as captains at the S. W. Pass and Balize stations, who shall be elected and serve for the term of three months, unless suspended by the master and wardens for sufficient cause.

The duty of the captains at these stations shall be to have the general supervision and direction of the pilots under their command, also of the boats and crews; they shall make a correct report to the master and wardens, on the first of October next, and quarterly thereafter, giving the names, tonnage, and draft of water of all vessels piloted to and from sea, and names of pilots performing the duties, and the time and place of boarding all inward bound vessels.

Article 3d. A captain of each boat shall be elected for the term of one month, whose duty it shall be to take command of and be responsible for the boat and other property confided to his care, as well as for the good conduct and faithful performance of duty by the persons on board while absent from the stations.

Art. 4th. The captains, while on a cruise, shall keep a correct record of all vessels boarded, the time of boarding, and the bearings and distance from land, if in sight, and if not, as near as possible, and report the same to the captain of the station on arrival.

Art. 5th. It shall be the duty of all pilots piloting a vessel in from sea, to report the same as soon as possible to the captain of the station at which he may arrive.

Art. 6th. No person commissioned as a branch pilot shall keep for sale at any of the stations any description of spirituous liquors, or be engaged in any other business, unless by the consent of at least two-thirds of the whole number of pilots in commission.

Art. 7th. Any pilot who may go on board a vessel in a state of intoxication, or be guilty of misconduct while discharging his duties as pilot, shall be suspended, and be liable to a fine, if found guilty

after investigation, as provided for in the 13th section of the law relative to pilots.

Art. 8th. It shall be the duty of each and every pilot to give notice to the master and wardens of any neglect of duty or violation of the rules and regulations that may fall under his observation.

Art. 9th. In all elections for captains of stations or boats, a majority of the whole number of pilots in commission is necessary. In case of absence on duty or sickness, a vote may be given by proxy.

GEO. W. McGERREN,
Master Warden.

The above rules and regulations are approved by the undersigned.

CHAS. BRIGGS, Chairman.
CHESTER HILLYARD,
WM. CREEVY,
Committee of New Orleans Chamber of Commerce.

Executive office, Baton Rouge, approved August 3d, 1857.

ROBERT C. WICKLIFFE,
Governor of the State of Louisiana.

Pilots now in Commission.

The following are the pilots now in commission.

Joseph Shepherd,
J. B. Williams,
W. T. Smith,
} Board of Examiners.

Wm. T. Levine,	A. J. Ruiz,
Jos. Preeble,	A. D. Allen,
Francis Williams,	L. F. Higgins,
Geo. Dennis,	Jno. Nichols,
Jno. McLaughlin,	E. C. Bannen,
Jno. Fowler,	Sol. Disney,
B. S. Ames,	J. W. Lyons,
Geo. W. Cloutman,	Amos Towne,
Chas. E. Mortimer,	Jas. Scott,
Thos. Connor,	Jno. Perin,
J. Yarborough,	J. T. Heath,
Samuel Hill,	Cyrus Morgan,
Jno. Robinson,	J. E. Dunham,
J. J. Jarvis,	Jno. Conrod,
N. W. Cloutman,	T. J. Vanderslice,
Chas. Dennis,	R. Francis,
D. B. Morgan,	O. A. Ames,
Edw'd Clark,	W. E. Pendleton,
Geo. Benson,	Thos. R. Jones,
W. C. Davis,	J. L. Dows,
Hy. Johnson,	C. S. Clark,

and Warren Chism.

Filed May 12th, 1858. Sig'd J. W. A.

MASTER & WARDENS
vs.
S. Ship CHAS. MORGAN & als.

Charter of the Southern Steamship Company of New Orleans.

State of Louisiana, City of New Orleans.

Be it remembered, that on this ninth day of the month of May, in the year one thousand eight hundred and fifty-six, and of the independence of the United States of America the eighty-first, before me, Wm. Christy, a notary public duly commissioned and sworn for the parish of Orleans, State of Louisiana, and in the presence of witnesses hereinafter named and undersigned, personally came and appeared before the parties whose names are hereunto subscribed, who declared that availing themselves of the provisions of the laws of the State of Louisiana, in such cases made and provided, and more particularly of the act of the *act of the* legislature of the said State providing "for the organization of corporations for works of public improvement and utility," being number 131 of said acts, approved on the 14th day of March, in the year 1855, they had covenanted and agreed, and do by these presents covenant and agree, and bind themselves and they whom they represent to form themselves into, and constitute a corporation for the purpose of transporting passengers, and freight, and mails, by steamship, for compensation, between the ports of New Orleans, Galveston, and Lavaca Bay, and between such other ports as this corporation may determine upon; and for the purpose of sea navigation by steam or otherwise, and to maintain steamships, and for all other purposes belonging and incidental to the business of navigation.

Article 1st. The name and title of said corporation shall be "The Southern Steamship Company of New Orleans," and its domicil is hereby established in New Orleans; it shall commence business as soon as the contracts named in article 4th shall be completed, and as soon as the requisites of the law shall have been complied with; and shall exist for and during the full term of twenty-five years from the date hereof, unless sooner dissolved in the manner hereinafter provided; during all which time, in its corporate name aforesaid, it shall have and enjoy succession, shall contract, sue, and be sued; it shall make and use a corporate seal, having for a device the coat of arms of the United States of America, and for inscription the name of the corporation; it shall hold, receive, purchase, sell, and otherwise convey property, both real and personal, movable and immovable, shall name and appoint such managers and officers as its interests and convenience may require; it shall make and establish such by-laws, rules, and regulations for the proper management of its business and affairs as may be necessary and proper, and possess generally all such powers and privileges as are given by law to corporations; and the president of the board of managers, or in his

absence from the city, any of the managers shall be the proper officer upon whom may be served citations, notices, or other legal process against the corporation.

Art. 2d. The purposes for which the said Southern Steamship Company of New Orleans is established, and the nature of the business to be carried on by it, are hereby declared to be to transport for compensation passengers, freight, mails, and all personal property by steamships, between the ports of New Orleans, Galveston and Lavaca Bay and between such other ports, foreign or domestic, as this corporation may determine, and for the purpose of sea navigation by steam, or otherwise, and to maintain steamships, and for all other purposes belonging to and incidental to navigation.

Art. 3d. The names and respective interests of the parties to this act, and to the original subscription-list, are declared to be as follows :—

Charles Morgan	shares	500
Harris & Morgan	"	500
E. J. Hart & Co.	"	170
Cornelius B. Payne	"	250
R. & J. Watson	"	170
J. L. Warner	"	150
F. F. Folger & Co.	"	150
Hughes Valletto & Co.	"	160
Coxe & Brenuz	"	20
C. T. Beddick & Co.	"	50
F. & E. Maignan	"	100
Graham & Co.	"	30
Jacob Mehle	"	100
H. Shepperd	"	10
Maurice Leuthan	"	50
S. D. Visser & Co.	"	50
Frederick Camerdon	"	25
Samuel Harby	"	10
D. R. Carroll	"	10
Race & Foster	"	50
R. B. Sumner	"	50
W. H. Lethford & Co.	"	50
W. H. Talbot	"	15
Charles H. Hughes	"	10
Rodolph Dossat	"	10
Norman Whitney	"	50
Laura & Dick	"	25
Peter Forshay	"	25
G. Lanata	"	50
J. Viosca, jr.	"	15
J. L. Levy & Simpson	"	25
Alfred Da Costa	"	10
J. Marks & Co.	"	10

Goldsmith & Haber	shares	50
Christian Mehle	"	10
A. Mengens	"	10
Karstendick & Co.	"	50
Henry J. Leovy	"	30
D. H. Marks	"	10
J. H. Mark & Co.	"	20
Campbell & Armstrong	"	10
W. A. Violette & Co.	"	100
Jas. Byrnes	"	50
J. A. P. De Fisser	"	30
Molony & Brother	"	10
J. C. Harris, for self, or Texas subscribers	"	390

All which said parties bind themselves upon the organization of the Company for business, to pay the amount of their subscriptions in cash, or to pay, at their option, 25 per cent. cash, on the 10th day of June, 1856, and to furnish their notes to be made payable at four, six, eight, ten, and twelve months from the 10th day of June, 1856, bearing 3 per cent. per annum interest from date, being 15 per cent. each of the remainder of the subscription for which a receipt shall be given by the secretary of the company, which money and notes amounting in the aggregate to $400,000, shall constitute the capital stock of the company, and shall be divided into 4000 shares of $100 each, and shall be subject to all the contingencies of capital; and it is distinctly understood and agreed, that no stockholder or member of this corporation shall ever be held liable or responsible for the contracts, faults, or other acts of the company, in any further sum than the unpaid balance due to the company on the shares owned by them; nor shall any mere informality in organizing, or other circumstance whatever, have the effect of exposing the stockholder to any liability beyond the amount of his stock; nor shall any informality in organizing render this charter null.

Art. 4th. All the corporate powers of the company shall be exercised by a board of managers and such officers and clerks they may appoint. The board of managers shall consist of four members of the company, who, after the expiration of the term of office of the present board, as provided by Article 5th, shall be elected by ballot on the first Monday of December of every five years, at such place in the city of New Orleans as the acting board shall designate, of which election they shall give at least fourteen days' previous notice in English in two of the newspapers published in said city, and they shall appoint three members of the company to preside as inspectors of such election, and should any of said inspectors decline or fail to attend, the president shall have the power to appoint others to fill the vacancies. The board of managers thus elected shall take their seats on the first Monday in February after the election, and shall hold the same until others are elected in their stead and shall take

their places. Those persons receiving a plurality of votes, shall be considered and declared duly elected. The board of managers shall fix the amount of compensation of all persons employed by them in the service of the company. They are hereby invested with full power to adopt such by-laws, rules, and regulations as they may deem requisite and necessary for the company and the transaction of its affairs; provided, the same shall not conflict with the true intent and meaning of this act of incorporation or with the laws of this State; they shall have power, and they are authorized to buy and sell real and personal property, movable and immovables, to make contracts, leases, mortgages, hypothecations, pledges, and compromises, to borrow money, and to purchase and build, or cause to be built steamships for the use of said company. The board of managers are empowered and authorized, and are hereby expressly directed to assume, on the part of this company, the execution of the contract which Harris & Morgan have entered into with the Postmaster-General of the United States for carrying the mail from New Orleans to Galveston and Indianola and back, the company thereby agreeing to carry the mails as per schedule, to receive pay for such service, and to submit to such fines as may be imposed for irregular performance of service; and also to assume the contract made by Harris & Morgan with R. & J. Watson for the supply of coal for the use of steamships, terminating on the 14th day of February, 1857; and that said board of managers are further authorized and empowered and expressly directed to purchase from Harris & Morgan the steamships C. Morgan, Louisiana, Mexico, and Perseverance, together with eight negroes employed on their line of steamships with the tools and stock of iron, rivets, bolts, furniture and apparel, and everything belonging and appertaining to said steamships, and to refund to said Harris & Morgan the money by them paid for the purpose of securing to this company the mail service until the first day of July, 1858, from New Orleans to Galveston and Indianola, Texas, and back to New Orleans; and the said managers shall pay to Harris and Morgan for the steamships, negroes, personal property, privileges, and mail contract, as aforesaid, the following sums as by Harris & Morgan proposed, to wit:—

For the steam-ship C. Morgan,	$130,000
For the steam-ship Louisiana,	80,000
For the steam-ship Mexico,	80,000
For the steam-ship Perseverance,	80,000
For the tools, iron, rivets, bolts,	525
For the eight negroes aforesaid,	8,800
For the mail contract aforesaid,	46,875

Any of the Board of Managers shall pay for the same by transfer to Harris & Morgan of the moneys and notes received by this company for subscription to the stock, etc.; the said notes shall be endorsed by the "Southern Steam-ship Company of New Orleans;" and for further consideration, and as part of said contract, the said

J. C. Harris and H. R. Morgan, together with C. B. Payne and E. J. Hart, shall be the first four managers of this company, and they shall receive, as full compensation for their services, five per centum on all sums received for freights, two and a half per centum on all other receipts, and two and a half per centum on disbursements; and neither the said commissions nor the said managers shall be changed until the first Monday of February, 1862; and the said commissions shall be paid as full compensation to all subsequent boards of management of this company. The steam-ships and negroes, to be purchased as above, shall be considered as delivered on the 10th day of June next, though some of them should be absent prosecuting a voyage, in which case the absent vessel or vessels shall be at the risk of this company from the commencement of the 10th day of June, 1856; and the profits and losses on such trips shall be equally divided between this corporation and Harris & Morgan; and the Board of Managers shall further have full power to do all other acts, matters, and things not herein provided for which shall or may be necessary for carrying into full effect the objects, interests, and purposes of the company; and they shall also have power to fill all vacancies that may occur in their number, and the person or persons so appointed shall serve for the unexpired term of said vacancy.

Art. 5. The following named persons, E. J. Hart, J. C. Harris, R. H. Morgan, C. B. Payne, shall constitute the first Board of Managers, and they are hereby invested with all the rights, powers, and privileges specified in the preceding article; they shall hold their office until the first Monday of February, 1862, and until others are elected in their places.

Art. 6. The Board of Managers, at the first meeting after every election of managers, shall elect from among themselves a President, who shall preside at all meetings of the Board and of the company, and shall conduct the business of the company generally, under the supervision of the Board; in case of his absence or inability to attend, he shall appoint a person from among the stockholders to act as the temporary president; in case of death or resignation of the president, the Board of Managers shall elect another to act in his stead until a new election of managers.

Art. 7. At the first election of managers, as provided for in art. fourth, each party or firm named in the third article of this act of incorporation, and every other person or firm who shall become a subscriber in conformity to the article prior to said election, shall be entitled to one vote, in person or by proxy, for every one hundred dollars so subscribed, and at all subsequent elections each certificate of credit on the stock books of the company shall entitle the holder thereof, or his proxy, to one vote for every one hundred dollars; provided, however, that such certificate shall not have been transferred to the person or firm claiming to vote within six months prior to such election.

Art. 8. The Board of Managers shall have the power to invest,

from time to time, one half, but not more, of the profits of the company, in loans secured by mortgage on improved and unincumbered real estate within the parishes of Orleans and Jefferson, in this State; and in every case the property mortgaged must be worth twice the amount loaned thereon. They may also invest the cash or surplus profits of the company in the purchase of any bonds or stocks created by or under the laws of the United States, or any of the States of the United States, and may make loans of such cash or surplus profits or pledge of any of the aforesaid securities, bonds, or stocks.

Art. 9. Meetings of the stockholders shall be held annually on the second Monday of Feb'y, and special meetings shall be held whenever ordered by the president, or called by him at the request, in writing, of any stockholders five in number. The company shall make semi-annual dividends.

Art. 10. The managers shall keep, or cause to be kept, in the name of the said corporation, and in books obtained for the purpose, correct record of all its proceedings, accounts, property, business and affairs, as well as a faithful and detailed account of the receipts and disbursements thereof, which books shall be at all times subject to the inspection and examination of any stockholder. They shall prepare, subject to the inspection of the stockholders, once every year, a full and complete statement of the affairs of said corporation, and the said board shall keep a transfer book, which shall be kept at all times open, except ten days before every semi-annual dividend.

Art. 11. Any subscriber failing to pay, within thirty days after maturity, such instalment or instalments on said stock as may fall due, shall have his shares sold at public or private sale, as the managers may determine, and proceeds of said sale shall be applied to his account on the stock-books. No stockholder shall vote on any occasion who is in default.

Art. 12. Certificates of stock shall be issued to the stockholders as soon as said stock shall be fully paid, and they shall be signed by the president and secretary. Stock-books shall be kept at the office of the company, at its domicil, and no transfer of stock shall be binding on the company until made on the stock-books. Should any subscriber desire to transfer stock previous to the full payment of the same having been made, he shall be permitted so to do by a substitute of the obligations of the party purchasing, provided the substituted obligations are satisfactory to the managers.

The capital stock of this company may be increased, from time to time, in such manner and to such extent as may be recommended by the managers, and determined upon by a majority in amount of stockholders, at a meeting convened for that purpose, after fifteen days' previous notice, in English, through two newspapers published in the city of New Orleans.

Art. 13. The stockholders of the company, at a general meeting to be convened for that purpose, after fifteen days' previous notice, in

English, in two newspapers, shall have the power to make any modifications, additions, or changes in this act of incorporation, except as provided in article 4th, or to dissolve it with the assent of three-fourths of the stock represented at such meeting, and for this purpose any holder of stock to the amount of one hundred dollars shall be considered a stockholder, and shall vote as prescribed in article 7, and any and all such modifications, additions, change or dissolution shall be recorded and published according to law.

Art. 14. When the period arrives for winding up the affairs of the corporation, its liquidation shall be conducted by three stockholders to be elected by a majority of stockholders in amount, and shall be styled liquidating commissioners, and it shall be their duty to dispose of the entire property of the company, on terms to be fixed by the stockholders at a general meeting; they shall collect all the amounts due to the company, after paying its debts divide the proceeds of sales and collections among the stockholders in proportion to their respective shares, as fast as enough shall be collected to divide.

Thus done and passed at my office, at the city of New Orleans aforesaid, in the presence of Geo. W. Christy and Auguste Commandeur, witnesses of lawful age, and domiciliated in said city, who hereunto sign their names, together with the said corporators and me, the said notary, on the day and year set forth on the caption hereof.

Original signed.

	No. of Shares.	Amounts
Chas. Morgan, per pro. Harris & Morgan,	500	$50,000
Harris & Morgan,	500	50,000
E. J. Hart & Co.,	500	50,000
R. & J. Watson,	170	17,000
C. B. Payne,	250	25,000
J. L. Warner & Co.,	150	15,000
F. F. Folger & Co.,	150	15,000
Hughes, Vallette & Co.,	160	16,000
Cox & Breaux,	20	2,000
Graham & Co.,	30	3,000
F. R. Cammerden,	25	2,500
S. Hardy,	10	1,000
R. B. Summer,	50	5,000
Chas. H. Hughes,	10	1,000
Laura A. Dix,	25	2,500
Ce. Mehle,	10	1,000
H. J. Leovy,	30	3,000
Campbell & Strong,	10	1,000
O. T. Baddecke & Co.,	50	5,000
Jacob Mehle,	100	10,000
A. Shepperd,	10	1,000
D. R. Carroll,	10	1,000

	No. of Shares.	Amounts.
W. H. Letchford & Co.,	50	5,000
J. Marks & Co.,	10	1,000
W. A. Violett & Co.,	100	10,000
V. & E. Maignan,	100	10,000
Maurice Lenham,	50	5,000
S. De Visser & Co.,	50	5,000
Race & Foster,	50	5,000
W. H. Talbot,	15	1,500
N. Whitney,	50	5,000
G. Sanata,	50	5,000
J. L. Leoy & Simpson,	25	2,500
Goldsmith & Haber,	50	5,000
Karstendick & Co.,	50	5,000
J. H. Marks & Co.,	20	2,000
Js. Byrnes,	50	5,000
J. A. P. de Vesser,	30	3,000
R. Dossat,	10	1,000
Peter Forshey,	25	2,500
J. Viosca, Jr.,	15	1,500
H. Mengens,	10	1,000
D. A. Marks,	10	1,000
Molony & Brother,	10	1,000
J. C. Harris, for self or Texas subs'rs	390	39,000

GEO. W. CHRISTY,
N. COMMANDEUR.
WILL'M CHRISTY, Notary Public.

I certify the foregoing to be a true copy of the original act extant and of record in my office. In faith whereof I grant these presents under my signature and seal of office, at New Orleans, this 9th day of May, A. D. 1856.

WM. CHRISTY, Notary Public.

Proceedings in the Supreme Court of the State of Louisiana.

Monday, April 18th, 1859, the court met, present, their honors E. T. Merrick, Chief Justice, A. M. Buchanan, J. L. Cole, Thomas T. Land, Associate Justices.

Mr. Justice Cornelius Voorhies absent.

MASTER AND WARDENS, App'ees,
vs.
Steam-ship CHAS. MORGAN and als., App'ts. } 5800.

By consent of parties, these eighteen cases were this day argued together by P. E. Bonford, Esq., of counsel for plaintiffs, and H. J. Levy, Esq., of Counsel for defendants.

Opinion and Decree.

Monday, May 9th, 1859. Present, their honors E. T. Merrick,

Chief Justice, A. M. Buchan, Thos. T. Land, and Albert Voorhies, Associate Justices.

Mr. Justice Cole absent, concurring.

MASTER AND WARDENS, App'ees,
vs.
St. Ship CHARLES MORGAN and als., App'ts. } 5800 to 5817.

Appeal from the Third Justice's Court of the parish of Orleans.

In this cause Mr. Chief Justice Merrick this day delivered the opinion of the court in writing in the words and figures following:—

Another case, entitled the Board of Harbor Masters *vs.* The Ship Chas. Morgan and al., No. 5967, was submitted with the eighteen suits in which the master and wardens of the port of New Orleans are plaintiffs, and upon the same argument and briefs. As the case of the harbor masters presents a question differing somewhat from the eighteen above mentioned cases, we shall consider it by itself on another occasion, and proceed now to decide the said cases, numbered on this docket from 5800 to 5817, inclusive.

The cases now under consideration present substantially the same questions which were recently decided by us in the case of the same plaintiffs against the ship Martha J. Ward. Defendants' counsel, however, supposes (contrary to the fact) that he presents to us a question not decided in that case when he calls our attention to the fifth ground of nullity set forth in his answer, as follows, viz:—

"The said act of 1855, No. 343, is null and of no effect, because the 6th section provides that the master and wardens shall be entitled to demand from each vessel arriving in the port of New Orleans from sea the sum of five dollars, *whether they be called upon to perform any services or not*," and these defendants allege that their vessels arrive at this port several times a week, and that in no manner whatever do the master and wardens, or either of them, render any services for these defendants, or for their steamers, officers, or crews."

On this point defendants contend that "whenever a charge is imposed upon a vessel by the sovereign authority, without any regard to a corresponding and equivalent benefit and advantage, the charge is a 'duty,' and is imposed unconstitutionally."

Without undertaking to controvert this proposition of defendant's counsel, which he has sustained by a very elaborate argument and numerous quotations of authorities, we think we may affirm of the statute relative to the master and wardens of the port of New Orleans that, as a whole, it is not obnoxious to the charge made against it. It is true that the sixth section of the act grants to the port wardens a right to demand the sum of five dollars from each vessel arriving in the port of New Orleans from sea "whether they be called upon to perform any services or not," but the meaning of the phrase is, whether they be called upon by the officers or persons in

charge of the ship to perform any special service or not; for it is evident that it is the interest of the shipping that there should be disinterested persons in the port easily found, and clothed with authority to perform such duties as are imposed upon the port wardens. For, as every ship entering from the Gulf has been subject to the damages and casualties of the sea, so it is the interest of such ships that there should be some person clothed with official authority to inspect the hatches, hold surveys of ship or damaged goods, to pronounce upon the seaworthiness of the vessel, to order and make sales of damaged goods, and to make an official record of all such proceedings, for the protection of the owners and all concerned in ship and cargo. The act in question provides for these necessities of commerce, and it compels the port wardens to keep an office where they may be found, and to keep a record of their proceedings. The legislature has deemed it the best and most equitable mode, to keep up this office, and maintain these officers during all seasons of the year, and the prevalence of the frequent epidemic diseases to which the city is subject, to levy a contribution upon all ships arriving from sea, and for the benefit and the necessities of which the expense is required to be incurred.

The maintenance of these officers (who also regulate the conduct of the pilots) is a benefit to the entire shipping interest, and each ship receives an equivalent in the convenience of obtaining the services and immediate presence of these officers, although they may not have been called upon to perform any special duty for the particular ship in question.

The act of the legislature relative to the port wardens does not, therefore, on a review of the question, appear to us unconstitutional on this ground.

The other questions in this case have been decided in the case of the plaintiffs against the ship Martha J. Ward, and we are satisfied with that decision.

It is therefore ordered, adjudged, and decreed that the judgment of the court below be affirmed, with costs.

Petition for Rehearing.

Filed May 23d, 1859. Signed F. A. Foygnet, d'y cl.

MASTER and WARDENS, app'ees,
vs.
STEAM-SHIP CHAS. MORGAN and als., app'ees. } 5800.

Defendants respectfully pray for a rehearing of this cause, on the following grounds: —

Defendants in their brief contended that "whenever a charge is imposed upon a vessel by the sovereign authority, without any regard to a corresponding and equivalent benefit and advantage, the charge is a duty, and is imposed unconstitutionally." They further contended that the United States constitution forbade the States from

laying duties on vessels without the consent of Congress, and they asserted that the act vesting the board of port wardens with power to impose a charge of five dollars on every vessel, "without regard to a corresponding and equivalent benefit and advantage," thus laid a duty, and in this manner contravened the United States constitution.

This Honorable Court, without the first of these premises, declares that as the port wardens perform services of a general nature beneficial to the defendants, the charge enacted by them is not a duty. But the position we assume, and which the court say they will not controvert, and which they say "is *sustained* by a very elaborate argument and numerous quotations of authorities," requires not only that there must be a benefit and advantage for the money demanded, but there *must* be a *corresponding* and *equivalent* benefit and advantage for the money demanded (see 3 Strobhart's Law Reports, p. 594). A law declaring that certain persons shall demand of every vessel a sum of money proportionate to the services rendered would be constitutional, but, according to our humble opinion, a law declaring that a fixed sum should be collected by those persons in every case from every vessel, without reference to the size of the vessel, the number of trips made by her, the character of the services performed by the persons making the demand, would be within the rule laid down by the Supreme Court of South Carolina, and would be violative of the United States constitution, because compelling a party to pay a sum of money without any regard to a *corresponding* and *equivalent* benefit and advantage.

We would be gratified to have the opinion of this court upon one point, to which we have attached importance, and which appears to have been overlooked.

We contended in our argument that *where Congress has regulated* any branch of commerce, the States are without power to legislate upon the subject, and we relied on article 1st, section 8th, § 3, of the United States Constitution, and on numerous decisions, and we showed that the whole subject of charges on vessels had been regulated by Congress, in numerous statutes from 1789 to 1847 (see Synoptical Index of Laws of United States, page 266). We think, then, that even if the charge allowed by the statute creating the Board of Port Wardens is not a duty, that the statute is one affecting commerce, and is, as a branch of commerce, regulated by the United States statutes, and therefore beyond the reach of State legislation.

There are other points to which we desire to invite the attention of the court, but in reference to them we can offer nothing more than the argument contained in our brief.

(Signed) H. J. LEOVY, Counsel for Defendant.

(Entry on Minutes.)

Order refusing Rehearing.

Monday, May 30th, 1859. The court met. Present, their Honors E. T. Merrick, Chief Justice; A. M. Buchanan, J. L. Cole, Thomas T. Land, and Albert Voorhies, Associate Justices.

MASTER AND WARDENS, app'ees,
vs.
Steamship CHARLES MORGAN and als., app'ts. } 5800 to 5817.

It is ordered, adjudged, and decreed that the rehearing prayed for in these eighteen cases be refused.

Petition for a Writ of Error.

Filed June 10th, 1859.

MASTER AND WARDENS of New Orleans
vs.
Steamship CHARLES MORGAN and als., and THE SOUTHERN STEAMSHIP COMPANY of New Orleans.

To the Honorable, the Judges of the Supreme Court of the State of Louisiana.

The petition of the Southern Steamship Company of New Orleans, a company incorporated under the laws of Louisiana, respectfully represents:—

That there is error to their prejudice in the final decree rendered in the above entitled suit by this court, being the highest court of law or equity of the State of Louisiana in which a decree can be had, and that a writ of error lies from said decree to the Supreme Court of the United States, for the following reasons: The defendants have alleged that the statutes under which plaintiffs claim, are invalid, null and void, because in controvention and in violation of Art. 1, Sect. 10, § 3; of Art. 1, Sect. 11, § 2; of Art. 1, Sect. 9, § 15, and of Art. 1, Sect. 8, § 3, of the United States Constitution, and the decision of this honorable court is in favor of the validity of the said statutes and against the exemption set up by the defendants, as will more fully appear by reference to the record of this cause.

Wherefore petitioners pray that a writ of error be allowed them, to operate as a supersedeas and to stay execution, with citation returnable to the Supreme Court of the United States upon their giving bond, with security, as the law directs.

H. J. LEOVY, Attorney for Petitioners.

Bond for Writ of Error.

Supreme Court of the State of Louisiana.

MASTER AND WARDENS, app'ees,
vs.
Steamship CHARLES MORGAN and als., app'ts.

Filed June 10th, 1859.

EUGENE LASERE, Clk.

Know all men by these presents, that the Southern Steamship Company as principal, and Frederick Camerden and R. B. Sumner as sureties, are held and firmly bound unto the Master and Wardens of the port of New Orleans, in the full and just sum of four hundred dollars, to be paid to the said Master and Wardens, or to their certain attorney, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 10th day of June, in the year of our Lord one thousand eight hundred and fifty-nine.

Whereas, lately in the Supreme of the State of Louisiana, in a suit depending in said Supreme Court, wherein the Master and Wardens are plaintiffs and the Southern Steamship Company are defendants, being said No. 5800 of the docket of said Supreme Court, judgment was rendered against the said defendants, and the said defendants having obtained a writ of error, and filed a copy thereof in the clerk's office of the said Supreme Court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Master and Wardens, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington, the first Monday of December next.

Now the condition of the obligation is such, that, if the defendants shall prosecute their writ to effect, and answer all damages and costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

(Signed) E. J. HART, [L. S.]
Pres't S. S. Sh. Co.
FRED'K CAMERDEN. [L. S.]
R. B. SUMNER. [L. S.]

Signed, sealed and delivered in the presence of
L. C. DUNCAN.

Approved by EDWIN T. MERRICK, Chief Justice.

Endorsed: Supreme Court of the State of Louisiana. No. 5800. Bond for writ of error. Master and Wardens, app'ees, vs. Steamship Charles Morgan and als., app'ts. Filed June 10th, 1859.
(Signed) EUGENE LASERE, Clk.

Writ of Error.

United States of America, ss.

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Louisiana, greeting:—

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before you or one of you, being the highest court of law or equity in said State in which a decision could be had in the said suit between the Master and Wardens of the Port of New Orleans and the Southern Steam-ship of New Orleans, being No. 5800 in the Supreme Court of Louisiana, wherein was drawn in question the validity of a statute of said State of Louisiana, on the ground of its being repugnant to the constitution and laws of the United States, and wherein was drawn in question the construction of several clauses of the United States constitution, and the decision was against the right, privilege, and exemption specially set up under said clauses of said constitution, a manifest error hath happened to the great damage of the said Southern Steam-ship Company of New Orleans, as by their complaint appears; we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held; and that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edwin T. Merrick, Chief Justice of the Supreme Court of the State of Louisiana, this tenth day of June, in the year of our Lord one thousand eight hundred and fifty-nine.

Supreme Court of the State of Louisiana, No. 5800. Filed June 10th, 1859.

(Signed) EUGENE LASERE, Clerk.

Allowed by

(Signed) EDWIN T. MERRICK, Chief Justice.

Writ of Error.

United States of America, ss.

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Louisiana, greeting:—

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Supreme Court, being in suit

No. 5800 in said Supreme Court, before you or one of you, being the highest court of law or equity in said State, between the Master and Wardens of New Orleans and the Southern Steam-ship Company of New Orleans, a manifest error hath happened to the great damage of the said Southern Steam-ship Company of New Orleans, as by their complaint appears; we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this tenth of June, in the year of our Lord one thousand eight hundred and fifty-nine.

(Signed) J. W. GURLEY,
Clerk of the U. S. Circuit Court for Eastern District of Louisiana.

No. 5800. Supreme Court of the State of Louisiana. Filed June 10th, 1859.

(Signed) EUGENE LASERE, Clerk.

Citation in Error.

United States of America.

To the Master and Wardens of the Port of New Orleans, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of Louisiana, wherein the Southern Steam-ship Company of New Orleans are plaintiffs in error, and you are defendants in error, being No. 5800 of Supreme Court of Louisiana, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edwin T. Merrick, Chief Justice of the Supreme Court of the State of Louisiana, this tenth day of June, in the year of our Lord one thousand eight hundred and fifty-nine.

(Signed) EDWIN T. MERRICK, Chief Justice.

No. 5800. Supreme Court of the State of Louisiana. Filed June 10th, 1859.

(Signed) EUGENE LASERE, Clerk.

Endorsed:

Supreme Court of the State of Louisiana. No. 5800.

MASTER and WARDENS vs. STEAM-SHIP CHAS. MORGAN and als. } Citation in Error.

Sheriff's Return.

Rec'd June 24th, 1859, and on the same day served a copy of this citation in error on S. B. Frost (Master Warden of the Port of New Orleans, defendant in error herein) personally. Returned same day.

(Signed) ROBT. SWAIN, Dept'y Sh'ff P. O.

Supreme Court. Filed June 25th, 1859.

EUGENE LASERE, Clerk.

Endorsement on the transcript:

5800. State of Louisiana, Third Justice's Court for the Parish of Orleans.

MASTER and WARDENS, app'ees, vs. STEAM-SHIP CHAS. MORGAN and als., app'ts. } No. 11,528.

5800. Supreme Court. Filed June 14th, 1858.

(Signed) LOUIS R. COURTIN, D'y Cl.

United States of America, Supreme Court, E. D., State of Louisiana.

I, Eugene Lasere, Clerk of the Supreme Court of the State of Louisiana for the Eastern District, do hereby certify that the above and foregoing forty-nine pages do contain a true copy of the Transcript of the proceedings had in the Third Justice's Court for the parish of Orleans, in a certain suit wherein the Master and Wardens were plaintiffs, and the steam-ship Charles Morgan et als. were defendants, and also of the proceedings had in this Supreme Court on the appeal taken by said defendants, which appeal is now on the files thereof, under No. 5800.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at the city of New Orleans, this fifteenth day of November, in the year of our Lord one thousand eight hundred and fifty-nine, and in the eighty-fourth year of the independence of the United States of America.

[SEAL.] EUGENE LASERE, Clerk.

United States of America, Supreme Court, E. D., State of Louisiana.

I, Edwin T. Merrick, Chief Justice of the Supreme Court of the State of Louisiana, do hereby certify that Eugene Lasere is Clerk of the Supreme Court for the Eastern District; that the signature of Eugene Lasere to the above certificate is in the proper handwriting of him, the said clerk; that the certificate is in due form of law; and that full faith and credit are due to all of his official acts as such.

In testimony whereof, I have hereunto set my hand and seal, at the city of New Orleans, this fifteenth day of November, in the year of our Lord one thousand eight hundred and fifty-nine.

EDWIN T. MERRICK. [SEAL.]

Filed 7th December, 1859.

IN U. S. SUPREME COURT.

SOUTHERN STEAMSHIP COMPANY, Plaintiff in Error,

VERSUS

MASTER AND WARDEN, Defendants in Error.

On the 15th March, 1855, the Legislature of Louisiana passed a law, the sixth section of which provides, "That in addition to the fees allowed to the master and wardens, they shall be entitled to demand and receive for each vessel arriving in the port of New Orleans from sea, the sum of five dollars, whether they be called on to perform any services or not; which sum they shall be entitled to demand of the captain, owner or consignee of every such vessel; and in case of failure or refusal to pay the same, they shall have the right to proceed for the recovery of the same against the said vessel before any Justice of the Peace, or other competent tribunal."

The only question which arises in the case is whether this law conflicts with the constitution of the United States? It is contended by the plaintiff in error—the

defendant in the Supreme Court of Louisiana—that it violated the 8th and 10th sections of the first article of the constitution of the United States; the first of which provides that Congress shall have the power to "regulate commerce with foreign nations and among the several States, and with the Indian tribes;" and the second, that "no State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any States on imports or exports, shall be for the use of the treasury of the United States, and all such laws shall be subject to the revision and control of the Congress. No State shall, without the consent of the Congress, lay any duty on tonnage, keep troops or ships of war, in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

I. The act of 1855 cannot be considered a regulation of commerce, but is a mere regulation of the police of the port of New Orleans, and belongs to that class of laws which the States have an unquestionable right to enact, such as inspection, quarantine and health laws, and those regulating their pilots, or internal commerce, etc.

9 Wheaton, 203, Gibbons v. Ogden.

11 Peters, New York vs. Miln.

12 Howard, 299, Cooley vs. Board of Wardens.
18 Howard, 71, Smith vs. Maryland.
18 Howard, 421, Pennsylvania vs. Wheeling and Belmont Bridge Co.
2 Peters, 245, Wilson vs. Black Bird Creek Insurance Co.

II. The fees allowed to the Port Wardens cannot be viewed as a duty or impost on imports or exports. It is clear that the fee of five dollars is to be paid to the Wardens for the same reason half pilotage is to be paid to pilots when they offer their services, although they are not accepted. It has always been held that this part of the pilotage law was constitutional. The office and functions of Port Wardens are just as indispensable for the purposes of navigation and commerce, as the office and functions of pilots. *Qui sentit commodum sentire debet et onus.* This question is elaborately examined and fully decided in the case of Cooley vs. Board of Wardens, 12 Howard, 299.

The act of the State of Louisiana, of the 13th March, 1857 — see act of that year, pages 88 to 91, entitled, "An act relative to pilots,"—shows in several of its sections the important duties imposed upon the defendants in error, in connection with the pilotage system, and for which no specific compensation is paid.

THOMAS J. DURANT,
of Counsel for the Wardens, Defendants in Error.

NEW ORLEANS, November 10, 1860.

SUPREME COURT.

BOARD OF HARBOR MASTERS

vs.

THE SOUTHERN STEAMSHIP COMPANY,

AND

MASTERS AND WARDENS *vs.* SAME.

DAILY DELTA PRINT.

In order to avoid unnecessary expense, this brief, which was prepared for the Supreme Court of Louisiana, is respectfully submitted to this Honorable Court as the argument upon which the Southern Steamship Company rely.

L. A. Salomon
Counsel for
Plaintiff in Error.

SUPREME COURT.

BOARD OF HARBOR MASTERS

vs.

THE SOUTHERN STEAMSHIP COMPANY,

AND

MASTERS AND WARDENS *vs.* SAME.

As all these cases present the same issues, by consent of counsel they are consolidated.

Whether viewed with reference to the important questions of law presented, or to the sum of money actually involved, these cases, must be regarded as being of sufficient importance to justify the most elaborate argument.

On one point pressed upon the attention of the Court by the counsel for plaintiffs, we find some of the Judges of the present Supreme Court of the U. S. expressing an opinion directly in opposition to that of Chief Justice Mar-

shall, Judge Story, Judge Daniel, and Judges Wayne and McLean, the sole surviving cotemporaries of Chief Justice Marshall. While on another, in a recent case, the Supreme Court of Louisiana were divided and a re-hearing being granted, the case was compromised. But it must here be remarked that no such difference exists upon the principal question presented in these cases. Upon that point, as we shall hereafter show, the Judges of the Supreme Courts of Louisiana, South Carolina, Alabama and Maryland, without an exception, have decided in our favor. Thus it will be seen that the points of law presented are interesting and important, and their importance is increased by the fact that these defendants only, and in Louisiana alone, are taxed by laws whose constitutionality is now questioned, in a sum exceeding $25,000 per annum, although, as their charter shows, their capital does not exceed $400,000. If these laws are decided to be constitutional, and like demands are made in all the *ports* of Texas and Florida to which the vessels of defendants sail, it is no exaggeration to state that their annual tax by such laws will exceed $100,000 per annum, and the very existence of ship and steamship companies will be jeopardized, if not destroyed. And yet plaintiffs contend that these are but small charges paid for services,

and in no sense duties, and that the laws creating them in no manner affect the power vested in Congress of regulating commerce.

The following are the sections of the statutes under which plaintiffs claim: ——

"SEC. 5. That the Board of Harbor Masters shall have power to demand and receive from the commanders, owners or consignees, or either of them, of *every* vessel that may enter the port of New Orleans and load, unload or make fast to the levee, within the said limits, at the rate of two cents *per ton, to be computed from the tonnage* expressed in the register of such vessels respectively, and no more. This shall not extend to chalands, flats, keelboats, steamboats, or other vessels which are employed in the river trade, unless upon the application of the person having charge of such chaland, flat, keelboat, steamboat, or other vessels so employed." (Act 1856, p. 206.)

"SEC. 6. That in addition to the fees allowed to the master and wardens, they shall be entitled to demand and receive for each vessel arriving in the port of New Orleans from sea, the sum of five dollars, *whether they be called upon to perform any services or not;* which sum they shall be entitled to demand of the captain,

owner, or consignee of every such vessel; and in case of failure or refusal to pay the same, they shall have the right to proceed for the recovery of the same against the said vessel, before any justice of the peace or other competent tribunal." (Act 1855, p. 489.)

We consider that these sections are unconstitutional, because in conflict with the following provisions of the Constitution of the United States:

1. "No State shall, *without the consent of Congress, lay any duty of tonnage*, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay. Art. 1, Sect. 10, §3."

2. "No State shall, without the consent of Congress, lay any impost or duties on imports or exports, *except* what may be absolutely necessary for *executing its inspection laws, &c., &c.*" Art. 1, Sect. 10, § 2.

3. "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another, *nor shall vessels bound to, or from, one State be obliged to enter, clear or pay duties in another.*' Art. 1, Sect. 9, § 5.

4. "Congress shall have power to *regulate commerce*

with foreign nations, and among the several States, and with the Indian tribes." Art. 1, Sect. 8, § 3.

First, we contend that both statutes are unconstitutional, because, without the consent of Congress, they lay duties of tonnage.

In considering this question, it is to be observed that almost all the courts have distinguished between cases where services have been performed for which the demand is made, and those cases in which no services have been performed; some declaring the laws unconstitutional, even where services have been rendered, but *universally* where no services have been performed. *We contend that wherever a charge is imposed upon a vessel by the sovereign authority without any regard to a corresponding and equivalent benefit and advantage, the charge is a duty, and is imposed unconstitutionally*—and if the charge is made without reference to a *corresponding* benefit, it is immaterial whether services have been performed or not. And further, we contend, that even if the law be constitutional where services have been performed, it is unconstitutional in reference to the cases now before the court, because the sums claimed are not demanded for services, and *no services have been performed.*

1. The statutes relied upon by plaintiff are unconstitu-

tional without reference to services performed by plaintiff, because, "they impose a charge without any regard to a corresponding and equivalent value." The Constitution declares that no State shall lay any duty of tonnage, and yet the act creating the Board of Harbor Masters expressly declares that the Harbor Masters shall have power to demand and receive of every vessel entering the port of New Orleans "at the rate of two cents *per ton*, to be computed from the *tonnage* expressed in the register of such vessels respectively, and no more." The word "tonnage" is not used in the act creating the Board of Port Wardens, but the duty is a tonnage duty in disguise, for a duty upon the vessel is of course a duty upon the tonnage of the vessel. And here it is well to observe, that the Harbor Masters receive their two cents on every ton whether they render services or not; so too, the Port Wardens whose duty it is to survey damaged goods, "in addition to their fees" are "entitled to demand and receive for each vessel arriving in the port of New Orleans from sea the sum of five dollars." This is given to them for no services whatever, and is what is demanded in the present suits. In the great port of New York commerce is not thus shackeled. The Port Warden

when called upon to perform services is paid as other employees are paid—the business being purely one of contract, but in no case is a *duty* of five dollars laid for their advantage and without any corresponding benefit. Referring to the unmistakeable and literal meaning of the words of the Harbor Masters Statute there would seem to be no difficulty. The act says they shall be paid two cents on every *ton* to be computed by the *tonnage*. The Constitution declares no State shall lay a duty of *tonnage*. Clearly, according to all rules of interpretation the law is in conflict with the prohibitory provision of the Constitution. It is impossible for language to express ideas more clearly than are here expressed, and it seems to us strange that the law should be subjected to any other construction than that we have placed upon it.

These Statutes were enacted in 1805, and incorporated in the Revised Statutes of 1855 and 56. When they were first adopted steamboats and steamships were unknown. The first steamboat seen at our port arrived here in 1812. The Statutes, therefore, imposing these duties on vessels arriving from sea were intended for a class of vessel that on an average made a few trips a year. The duty paid by them was small and no disposition was shown to

question the legality of the imposition. But the steamships of plaintiffs frequently make two trips a week, other steamships are departing weekly, and the whole commerce of the city and State is crippled by exactions hitherto and elsewhere unknown. The tonnage tax in South Carolina on steamships, which has been declared unconstitutional, was but one cent on the ton every three months—ours is two cents on the ton every trip, or in many cases *four cents a ton per week.*

The construction of the tonnage clause in the Constitution by the State Legislatures and by the National Legislature, is that for which we contend. The United States Constitution became operative in March, 1789, and as early as the 11th August, 1790, Congress *assented* to the application of Maryland, Georgia and Rhode Island to lay tonnage duties for various purposes, among others, for the purpose of paying *Port Wardens* of Baltimore (1 Stat. at Large, p. 185.) These States, by applying for the consent of Congress, and Congress by giving it, show the construction of the Constitutional clause at that early day and by the very framers of the Constitution. Congress, in assenting, qualified this permission by limiting the operation of the statute to the following January: In July, 1791, (Stat. at Large, p. 190,) Congress gave its

assent to the State of Maryland to "an act to empower the *Wardens of the Port* of Baltimore to try and collect the *duty* therein mentioned *until the 10th day of January next.*" A similar statute granting the consent of Congress to other States, was passed in 1792, (1 Stat. at Large, p. 243,) and as late as 1838 Congress continued to show their construction of this clause by their act concerning the port of Baltimore, wherein it is said, "that nothing herein contained shall authorize the demand of a duty on tonnage *on vessels propelled by steam.*"—5 Stat. at Large, p. 215.

See Act of 1806, 2 Stat. at large, p. 357, granting permission to South Carolina to lay tonnage duties in certain cases, and we ask the attention of this Court to the Acts of 1816 and 1822, (3 Stat. at Large, 331 and 685,) granting permission to Georgia to lay tonnage *duty* to pay *Harbor Masters* and Health Officers."

But we understand counsel to contend that the tonnage charges imposed by the laws of Louisiana, and which, against a single company, exceeds $25,000 per annum, are not *duties*, because a "tax or duty is an exaction to fill the public coffers for the payment of the debts and the promotion of the general welfare of the country," and because the amount paid is for services rendered. To

the first, we have only to answer, that to constitute a tax or duty, it is not necessary that the money collected should go into the public coffers. A charge imposed to pay the Governor's salary, is a tax, whether it goos first to the Treasury and thence to the Governor, or directly to the Governor's pockets. If this were not so, tonnage duties and all kinds of illegal charges might be imposed to pay every officer in the State, and thus not only the Constitution of the United States, but all those provisions of our State Constitution in reference to taxes, might easily be evaded on the ground that the exactions imposed were not tonnage duties because the money did not first go into the public coffers. When Maryland, Georgia, South Carolina and Rhode Island applied for the consent of Congress to lay *duties* for Port Wardens and Harbor Masters, and Congress gave that consent, no one supposed that the duties on tonnage were not duties, because the money collected went directly to the Port Wardens and Harbor Masters of ports in those States. The Supreme Court of Alabama, in 3d Stewart and Porter, p. 304, construing the tonnage clause of the United States law, say, "I interpret the word 'duty,' as here used, to signify tax, custom or toll. This, it seems, no State is authorized to lay on the tonnage of any vessel, without the consent of

Congress, *for any purpose.*" In a case in South Carolina, the Supreme Court said: "The notion that it is not a tonnage duty because it does not go into the public coffers, cannot be sustained. What is done with the money cannot affect the question. Is this a tax or charge incurred by entering the harbor of Charleston? Every one is obliged to say yes. * * * The only duty of tonnage levied by the authority of this State, since the Constitution, was for the benefit of the Marine Hospital, and that was by the consent of Congress. This shows that the end to which the money to be collected is to be applied, cannot affect the character of the law, for there public charity had the benefit of it." (3d Strobhart, South Carolina Law Reps., p. 599.) And Justice McLean, in a case in the U. S. Supreme Court, says: "The application of the money exacted under this Act of Pennsylvania, it is said, shows that it is not raised for revenue. The application of the money cannot be relied on as showing an Act of a State to be constitutional. If the State has power to pass the Act, it may apply the money raised in its discretion." (12 How., 325.) The Supreme Court of the United States, through C. J. Marshall, have defined an impost or duty on imports to be a "custom or a tax levied on articles brought into a country." (12

Wheaton, 437.) Nothing is here said about the destination of the money after its collection. In the many cases to which we shall refer in the course of this argument, it will be found that in no instance was it asserted that these charges were not duties because they did not go into the public coffers, though in most of them the duties were imposed for the benefit of individuals and of charitable associations. We have only to add that the Port Wardens and Harbor Masters are *State officers*, sworn to defend the Constitution, and having other duties to perform than those of port officers. (See sec. 6 of Harbor Master Act 1856, p. 206, and secs. 13 and 15 of Pilot Act of 1855, p. 372.) The amount collected, then, is paid to State officers, performing various services, in lieu of fixed salaries—decreasing the amount paid out of the State Treasury, for the general welfare of the country, and is necessarily as much a duty or tax as if imposed for the payment of the salary of the Governor. The Supreme Court of South Carolina, in the case before referred to, say, "Who is the Harbor Master? He is an officer of the corporation, (ours is of the State,) exercising, *pro hac vice*, under the authority of the State, the legislative power. He is to be paid for his services by the appointing power, and if it, instead of drawing from its own funds

for that purpose, chooses to relieve them by imposing the burden on the defendants, is not that the same thing as if the results of the charges arising under this ordinance had been directed to be collected and paid into the city treasury. It seems to me so, and certainly if the provision had been direct for the collection and payment of tonnage to the city council, no one could doubt that the Constitution would be plainly violated."

But it is further contended by plaintiffs that these charges, imposed by the statutes, are not duties, but mere exactions for services rendered. To this, we answer that in the present cases no services whatever were rendered, and that you do not pretend to claim for services rendered. You claim under those sections of the acts which give the amount claimed by you as extra compensation, and not for services. The Port Wardens are surveyors of damaged goods. Have they surveyed any damaged goods of ours? The Harbor Masters station vessels; have they stationed any vessels of ours? Have we not a wharf allotted to us by the City Council, and for which we pay an enormous price? Then what services have been rendered that we should daily have to pay these exactions of Harbor Masters and Port Wardens? And even if services had been rendered and

plaintiffs had been called on, they could only obtain a compensation equivalent to the services performed, and that upon the ground of contract, for all statutes that lay a charge upon the tonnage of vessels for services or otherwise, "without any regard to a corresponding and equivalent benefit or advantage," are unconstitutional, and null and void. This duty "no State is authorized to lay on the tonnage of any vessel without the consent of Congress, *for any purpose.*"—(3 Stewart and Porter Ala. R:, p. 304.)

Had the Convention that framed the Constitution designed that tonnage duties should be laid without the consent of Congress for the payment of Port Wardens and Harbor Masters, it is fair to presume the exception would have been made to the general prohibition. In the 2d clause of the 10th section, every State is prohibited from laying duties or imposts "excepting what may be absolutely necessary for executing its inspection laws." But in the clause referring to tonnage duties, no exception whatever is made, it stands on the same footing as the rest of the clause, which, in [illegible] nature, can admit of no exception. It is clear that the Constitution framers considered that if they had not made the exception in favor of inspection laws, no such exception could have

been construed to exist; as they have not made the exception in the case of tonnage in favor of Harbor Masters and Port Wardens, applying the same rule of interpretation, it is fair to conclude that no such exception was designed. "If it be a rule of interpretation to which all assent, that the exception of a particular thing from general words, proves that, in the opinion of the lawgiver, the thing excepted would be within the general clause, had the exception not been made, we know no reason why this general rule should not be as applicable to the Constitution as to other instruments. (12 Wheaton, 438.)

The States of Maryland and Georgia did not think it unnecessary to apply to Congress for permission to lay tonnage duties to pay their Harbor Masters and Port Wardens, although for services rendered, nor did Congress consider it unnecessary when they gave their consent, and limited the period to a few months. If tonnage duties can be imposed to pay State officers like Harbor Masters and Port Wardens, why not to pay Levee Police and Wharfingers? They are infinitely more useful to these defendants than the Port Wardens, whom they never see. Indeed, why not impose the duty to pay all officers, for none in the State are less useful to us than the officers now suing. And if a duty of two cents per ton can be

imposed, why not fifty cents per ton? On a similar question, the Supreme Court of the United States, through Judge Marshall, said: "It is obvious that the same power which imposes a light duty, can impose a very heavy one, *one which amounts to a prohibition.* Questions of power do not depend on the degree to which it may be exercised. *If it may be exercised at all,* it must be exercised at the will of those in whose hands it is placed. (12 Wheaton, 439.)

Counsel for plaintiffs argue as if these necessary officers will cease to exist if they are not paid in the manner now fixed by the State laws. Were such to be the result, it would be no good reason why we should pay an illegal exaction for which we receive no benefit—but such would by no means be the consequence. Other States do not collect illegal duties, and yet they have the necessary port officers. The Port Wardens of New York receive compensation when called to examine damaged goods, and this is deemed sufficient. In other States the consent of Congress has been obtained, (but never to such extortionate rates as demanded under the laws of Louisiana.) In others, again, they are paid salaries as other State officers are paid. There is no danger that we will be without Port Wardens and Harbor Masters, even though these laws be declared unconstitutional.

2. We have thus far been contending that these acts exacting tonnage duties are unconstitutional, whether services are rendered by the claimants or not. We now come to the second branch of the question, and we shall show that even if these exactions are permitted for services performed, they are *never* allowed where services have not been rendered. In presenting this subject, we propose to examine the decisions upon tonnage duties generally, distinguishing, however, in the cases where services were performed and where they were not. We will now remark, however, that with one single exception, (and that a divided court,) we have not met a case where the law was declared to be constitutional where no services were rendered. The nine Judges of the Supreme Court of South Carolina, the Judges of the Supreme Court of Alabama, the Judges of the Supreme Court of Georgia, and the Judges of the Supreme Court of [redacted], without *one exception*, have decided that all laws imposing charges on tonnage of vessels for the payment of officers, except as an equivalent for services rendered, (under implied contract,) a *quid pro quo*, are unconstitutional, null and void.

We do not believe that plaintiffs contend that they have rendered any services for the amounts they *now* claim.

As to the Port Wardens claim, we have had no goods damaged, and, therefore, could not have needed their services. The duty of Harbor Masters is to station vessels, but we pay over $20,000 per annum for a wharf, which is allotted to us, (see Ord. No. 1017, p. 346, of City Laws and Ordinances, introduced in evidence,) and up to which we come by steam. The Harbor Masters present several bills. Have they done any thing for the amounts claimed, and is the amount claimed for *a compensation for services rendered?* Are not they and the Port Wardens claiming under statutes which allow the sums claimed without any reference to services. Thus much as to the question of fact as to the services rendered by plaintiffs.

Upon the Harbor Master Act no decision of the Supreme Court of the State has ever been rendered. It is only with the increasing commerce of the city, and its growing steam intercourse, that the tax assumes sufficient magnitude to cause litigation. The Act was presented for judicial construction in the recent case of

In that case the claim was for *services actually rendered.* The Court was divided—a re-hearing was granted; the parties then compromised, and no final judgment was ever rendered. The legality of the Act creating the Port

Wardens, (in which the word "tonnage" is not mentioned,) has been considered twice by the Supreme Court of this State, but only once did the question arise in a case where no services were performed, and then we understand the Court, through Judge Martin, to decide that the Act is unconstitutional when there is a claim without special services rendered. (See Warden vs. Prats, 10 R. R., 459.) The Court in that case say: "If the former fees (given by Act of 1805) be constitutional, nothing has been said to induce us to pronounce the latter (the Act of 1821 amending 1805) unconstitutional, *except that the act of* 1821 *authorizes the demand of the fees, although the services intended to be remunerated were not rendered.* The difficulty which this circumstance presents vanishes before the *admission* that, in this case, the services for which *remuneration* is demanded were actually rendered."

The only other Louisiana decision upon the Port Warden Act is that of Wardens vs. Ship Hawes. In that case the Wardens were called upon to perform certain services—to survey a damaged ship and to direct and attend a sale of damaged goods; for *these services* they charged $45, and it was allowed them by the Court, not because any statute gave it to them, but because they had been employed to do work and were entitled to pay

for it. It was simply a matter of contract, and so the court expressly decided.

But *the very point involved in this suit* was presented to the Supreme Courts of Alabama, Maryland and South Carolina. The Alabama statute creating the Board of Harbor Masters is copied from that of Louisiana. In a suit by the Harbor Masters for their fees under their Statute, the defendant resisted their demands on the ground, among others, that the law was in conflict with the clause of the 10th Sect. of the United States' Constitution. The case was taken to the Supreme Court, and the Court sustained the defendant, and decided the law to be unconstitutional. The Court say, "so much only of the foregoing restriction as relates to the power of the States to lay any duty of tonnage has a direct application to the question under consideration; but I present it, with the context, that the full meaning and intent of the particular inhibition may more clearly oppear. I interpret the word "duty" as here used, to signify tax, custom, or toll. This it seems, no State is authorized to lay on the tonnage of any vessel, without the consent of Congress, *for any purpose.* Such consent it is not pretended has been obtained." "This, too, is equally chargeable by the act, *whether any services*

in the particular case be required of, or rendered by him or the Wardens or not; and whether the vessel has entered the corporate limits of the city or not. In this case neither appears to have been done." "The inhibition against laying any duty of tonnage is placed *on the same ground, and is no less absolute* than that against keeping troops or ships of war, &c. The Constitution recognizes a distinction between imposts or duties on specific commodities imported or exported, and the more general duty of tonnage, on the contents of vessels; for while it provides, that, without the consent of Congress, the latter shall, *under no circumstances*, be laid, it authorizes the former for the purpose of executing the inspection laws;" and the Court go on to say, that if it be conceded that duties may be imposed to pay Harbor Masters, they may be imposed to pay many other officers, "and if a duty of three cents per ton may be authorized *without any particular services rendered*, why not *ten* or *fifty* to meet the various objects alluded to?" 3 Stewart and Porter, Ala. Rep., p. 302.

And in the High Court of Chancery of Maryland (3 Bland, p. 371) the Judge says:

"It is declared by the federal constitution, that 'no preference shall be given by any regulation of commerce

or revenue to the ports of one state over those of another;' that 'no state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws;' and that 'no state shall, without the consent of Congress, lay any duty of tonnage.'"

"*These rules being fundamental cannot be evaded in any manner whatever;* no preference can be given by requiring the payment of tolls or wharfage of any ships or goods, coming from other states of the Union, not demandable on those of this state; nor can duties or tonnage of any kind be exacted of ships or goods coming into our ports from any other of the United States, or from any foreign country, without the consent of Congress. And although it had been found expedient to collect in the port of Baltimore, and in many others of the ports of this Union, as in England, a small duty of tonnage, or port duty, to be appropriated to the sole purpose of clearing the port itself of all obstructions, and keeping it in good navigable order, and for repairing the public wharves; yet even that small duty, which might have been considered as a toll paid only for the use of the port itself, was held to fall within the scope of those constitutional

provisions, and not allowable without the consent of Congress, which was given to that act of Assembly by Congress. And which consent has been, from time to time. renewed since, as it has been found expedient or necessary to raise a fund, in that way, for clearing the port and repairing the public wharves. And so, too, as a means of regulating commerce and preventing, preparing for, or of adding to the energies of war, the federal government has the power to lay an embargo; and thus, for a season, partially to interrupt the use of all wharves, by closing the public ports altogether against all foreign intercourse."

* * "And so, too, a man, for his own private advantage, may build a wharf in a public port, and take what rates for the use of it, he and his customers can agree upon, for in that he does no more than is lawful in making the most of his own."

"But it is otherwise of those wharves belonging to individuals, which have been legally thrown open to the use of the public, and also with regard to those which are entirely and properly public wharves. As to all such as belong to individuals, or a body politic, which are affected with a public interest, the wharfage must be reasonable: and, after having been once legally adjusted,

cannot be enhanced to an immoderate amount. Such wharves are subject to some statutory regulations in England; and here they are particularly alluded to in several of our acts of Congress regulating the collection of revenue from goods imported, as places dedicated to the use of that commerce which the federal government *alone has a right to regulate;* and, consequently, no wharfage can be demanded for the use of any such wharf in a public port, either to an amount, or in a manner, so as in any way to give a preference prohibited by the federal constitution, or *to interfere with the regulation of commerce,* or the collection of such revenue by the federal government."

"This I take to be the true intention of the provisions of the federal constitution in relation to the regulation of commerce, and the laying of duties on imports as declared by various acts of Congress, and admitted by our own legislative enactments. And therefore, upon these principles I hold the act of Assembly which authorizes *The Mayor and City Council of Baltimore* to charge and collect such wharfage as they may think reasonable, from all vssels lying at or landing articles, *other than the productions of this state,* on any wharf belonging to *The Mayor and City Council,* or any public wharf of the city, to be unconstitutional and void."

But perhaps the most valuable of all the decisions is that of the Supreme Court of South Carolina. The case of Harbor Masters vs. Wilmington and Raleigh Railroad Company, 3 Strobhart's Law Reports, p. 594. The statute declared to be unconstitutional is almost identical with ours, and like ourselves the defendants had their own wharf specially set apart for them. The case was decided by the Court of Errors, composed in South Carolina, of the Court of Appeals and the Chancellors, together constituting a bench of nine Judges—the same number as compose the Supreme Court of the United States, and certainly, as learned as any in the Union. This Court, the organ of a people whose jealousy of State Rights has become proverbial, *unanimously* decided that their State law was null and void, because in contravention of several provisions of the United States Constitution.

The Court say :

"The ordinance of the City Council, set out in the special verdict, *inter alia* provides that 'steam packets and other vessels trading steadily, and performing regular successive voyages from the adjoining States of North Carolina and Georgia,' 'shall pay the harbor master *one cent per ton*, once every *three* months, or every quarter,'

The quesion made is, is this a tonnage duty under the act of Congress ?"

"On referring to Bouvier's Law Dictionary, I find that after giving the general definition of tonnage, 'the capacity of a ship or vessel,' he adds, 'the *duties* paid on the tonnage of a ship or vessel, are also called *tonnage*.' He defines duties by saying it is 'nearly equivalent to taxes, embracing all impositions or charges, levied on persons or things.' Construing the ordinance by these definitions, it would seem to be plain that it has undertaken (without the consent of Congress) to impose a duty of tonnage on the steam packets of the defendants. But is said the imposition of tonnage, in this case, is merely a mode by which the plaintiff is to ascertain *his fees;* and it is so called in the ordinance; 'the above fees' is its language. I should think there would be great force in this view, if it were so that the harbor master rendered any services for the defendants. If he assigned their packets a berth at any of the wharves, or did any other personal service for them, I should be disposed to say that measuring the value of his services by the tonnage of the ship, would not make the law allowing him compensation unconstitutional. For in such a case, although the letter of the constitution might be violated, yet its true meaning

would be untouched. But here the special verdict does not find that the plaintiff rendered any service at all to the defendants, and it was stated at the bar, and not contradicted, that the defendants have their own wharf, and that the plaintiff has no more to do with their steamers, in the harbor of Charleston, than he has with them when at Wilmington."

"The notion that it is not a tonnage duty, because it does not go into the public coffers, cannot be sustained. What is done with the money cannot affect the question. Is this a tax or charge incurred by entering the harbor of Charleston? Every one is obliged to say yes. For it is to be paid without any regard to any thing else than the steam packets coming to and entering the port. The distinction between a tax or duty, and fees or charges, is, that the former is imposed by the sovereign authority, without any regard to a corresponding and equivalent benefit or advantage: the latter proceeds upon the *quid pro quo*, and unless service be rendered nothing is to be paid. The only duty or tonnage levied by the authority of this State, since the constitution, was for the benefit of the Marine Hospital, and that *was by the consent of Congress*. This shows that the end to which the money to be collected is to be applied, cannot affect the character of

the law. For there public charity had the benefit of it."

"But it is not clear that the imposition here does not indirectly avail the public. Who is the harbor master? He is an officer of the corporation exercising *pro hac vice*, under the authority of the State, the legislative power. He is to paid for his services by the appointing power; and if it, instead of drawing from its own funds for that purpose, chooses to relieve them by imposing the burden on the defendants, is not that the same thing as if the results of the charges arising under this ordinance, had been directed to be collected and paid into the city treasury? It seems to me to be so; and, certainly, if the provision had been direct for the collection and payment of tonnage to the City Council, no one could doubt that the constitution would be plainly violated."

"The discrimination made in this ordinance, between vessels owned in and belonging to this State, and steadily plying and trading within the same, and vessels trading and performing regular successive voyages from the adjoining States of North Carolina and Georgia, is liable to the very grave objection arising under the 5th part of the 9th section of the 1st article of the Constitution of the United States, as recognized and enforced in *Chapman* v. *Miller*. For, certainly, it cannot be said this

is not giving 'a preference to the ports of one State over those of another,' nor that 'vessels bound to or from one State' are not required to pay 'duties in another'"

Thus we see that the courts of Louisiana, Alabama, South Carolina and Maryland, have decided that these laws are unconstitutional, and we have shown the construction placed upon the prohibitory tonnage clause of the Constitution, by the Legislatures of Georgia, Rhode Island, Maryland and South Carolina, and by the National Legislature, when it was composed of many of the men who framed the Constitution. Surely no position could be fortified by higher authorities.

As plaintiffs can find no decisions favorable to their views on the precise issues in these cases, they resort to those upon points that they contend are analagous. In order to appreciate the value of these decisions, it will be well to bear in mind the difference between a tax or duty, and fees or charges. The former is "imposed by the sovereign authority, without any regard to a *corresponding* and *equivalent* benefit or advantage; the latter proceeds upon the *quid pro quo*, and unless service be rendered nothing is paid." (S. Ca. case.) Thus in the case 6 An. 389, the Port Wardens were called upon to do certain work, and charged a sum that corresponded

with the labor performed—the amount paid was not a duty. The whole transaction was a contract, and a thing of daily occurrence. Bearing this distinction in mind, we will find no difficulty in any of the cases cited. The case of 11 M., 324, is not an analagous case, then too, the Court say, though States cannot lay tonnage duties, Territories can—besides it declares that the *implied* consent of Congress is sufficient, and that the *Territory* of Orleans had this implied consent, because its laws to become operative, were subject to the approval of Congress. This decision defined a duty as an exaction to fill the public coffers. We have already shown that the destination of the money collected is immaterial, and that the character of the exaction is not affected by the use made of the money. (See p. 9)

The cases of 9 R. R., 328, and 2d Ann., 538, are suits where the claims were for the use of the wharves. The defendants knew in advance what was charged for their use, and used them ; plaintiffs demanded a compensation corresponding to the value of the use of the wharves. To use the language of the attorney for plaintiffs in those suits, (and who is now of counsel for plaintiffs in these,) the amount claimed was for "remuneration or *compensation* for the use of a wharf, and can, with no propriety of

language, be confounded with a tax, duty or impost," and comes within the definition of *fees* or charges, as laid down in the South Carolina case. In the last of those suits, (2 Ann., 538,) the Court say: "Wharfage may lawfully be demanded, but beyond a *reasonable remuneration*—a *compensation for an equivalent*—it is said to be unconstitutional," and "if this wharfage is a tax on commerce, or on imports or exports, it is unconstitutional, however small the amount," and from the conclusion of the Court, it is fair to assert that, had the wharfage charge been shown to have been one dollar over a fair compensation for its use, a sum payable for its *value* under an implied contract, the Court would have declared the ordinance granting the charge, to be unconstitutional. They say "that the sole question with us is, whether *under the evidence*, it is competent for the judicial power to declare the ordinance unconstitutional. We are *under the necessity* of saying that we have *nothing before us* on which we can determine that the wharfage claimed by the plaintiffs is contrary to the Constitution of the United States, *by reason of its amount*," and the Court concludes by expressing a desire that the opinion of the Supreme Court of the United States should be obtained on the important questions presented to them.

And this disposes of the decisions of the Supreme Court of Louisiana, cited by the plaintiffs.

We will now review the decisions of the Supreme Court of the United States upon this and analogous subjects.

The first decision upon a parallel point, is that of Brown vs. State of Maryland—13 Wheaton, 419. The imposition of a duty on a vessel or on goods brought by the vessel, are alike prohibited by the Constitution. It is a tax upon those engaged in the business of importation, growing out of their business as importers.—See 7 Howard, 458. In this case (12 Wheaton, 419) the Court decided (C. J. Marshall being the organ) that a "State law requiring an importer to take a license and pay fifty dollars before he should be permitted to sell a package of imported goods, is in conflict with that provision of the Constitution of the United States which prohibits a State from laying any impost, &c., and also with the clause which declares that Congress shall have power to regulate commerce." We shall recur to this interesting case when we come to speak of the violation of that clause of the Constitution which gives to Congress the power to regulate commerce.

The counsel for plaintiffs have placed great reliance

upon a pilot case decided by the U. S. Supreme Court —the case of Cooley vs. Board of Wardens, 12 Howard, 299. This was a case in which certain half pilotage was claimed. In the first place, this Court will observe that the judgment was not that of an undivided bench. Judge McLean and Judge Wayne, cotemporaries of Judge Marshall and Judge Story, [redacted], before whom almost all the cases were argued involving the points now at issue, dissented from the opinion of the majority, and Judge Daniel, although assenting to the judgment, dissented from its reasoning. With Judges McLean and Wayne, we find, also, the great names of Marshall and Story, (see Judge Story's opinion in New York vs. Miln, 11 Peters, 102, in which he states that Judge Marshall coincides with him in opinion.) Even then if this judgment was in favor of plaintiffs' views, (and it is only contended that it is upon one branch of our case,) divided as it is, opposed as it is to the opinion of Judges Marshall and Story, and inconsistent with the unanimous opinion of the Judges of the Supreme Courts of South Carolina, Alabama, Maryland, and Louisiana, and with the construction of State and National Legislatures, it should have little weight, but we think we can show that this

decision is not analogous with ours, or opposed to our views.

In the first place, the pilotage is claimed under the pilot law of Pennsylvania. Now the consent of Congress was obtained to this law, as well as to all the pilot laws of the several States, by the following Act of Congress: "[redacted]s in the bays, inlets, rivers, harbors and ports of the United States, shall [redacted] in conformity with the existing laws of the States respectively, wherein such pilots may be, or with such laws as the States may respectively *hereafter enact* for the purpose, *until further legislative provision shall be made* by Congress.—Act of 1789, 1 Stat. at Large, 54. The fact that Congress, during the first year of its existence, passed the Act, with limitations as to the period, shows their sense of their right to legislate, and of the necessity for legislation upon this subject. Judge Curtis says, in this case, that "it cannot be denied that a tonnage duty, or an impost on imports or vessels, may be levied under the name of pilot dues or penalties, and certainly it is the thing, and not the name, which is to be considered."

But as this case is principally upon the subject of regulations of commerce, we will refer to it hereafter more

at length, and will show that it conflicts with all the previous decisions of that Court.

In concluding this subject, we beg to quote from G. J. Curtis' new work on the Constitution—p. 370, 2d vol.:

"In order to vest the supervision and control of the whole subject of navigation in Congress, it was further provided that no State, without the consent of Congress, shall lay any duty of tonnage. An exception, proposed by some of the Maryland and Virginia members, with a view to the situation of the Chesapeake Bay, illustrates the object of this provision. *They desired that the States might not be restrained from laying duties of tonnage 'for the purpose of clearing harbors and erecting light-houses.'* It was, perhaps, capable of being contended, that, as the regulation of commerce was already agreed to be vested in the general government, the States were restrained by that general provision from laying tonnage duties. The object of the special restriction was to *divide the commercial* power, and to give the States a *concurrent* authority to regulate tonnage for a particular purpose. But a majority of the States considered the regulation of tonnage an essential part of the regulation of trade. They adopted the suggestion of Mr. Madison, that the regulation of commerce was, in its nature, indi-

visible, and ought to be wholly under one authority. The exception was accordingly rejected."

We think that the tenor of all the decisions, and particularly those of Louisiana, Alabama, Maryland and South Carolina, will satisfy this Honorable Court that the statutes under which plaintiffs claim, so far, at least, as they impose duties on tonnage of vessels for the payment of State officers without reference to the services performed by them, are void, as being in contravention of that clause of the United States Constitution which prohibits States from levying tonnage duties without the consent of Congress.

Second. The Harbor Master and Port Warden statutes are null and void, because contravening the 2d clause of sec. 10 of the U. S. Constitution, which declares that, "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," &c.

But little need be said upon this point. All that we have urged and all the decisions we have cited, will apply as well to this question as to that wherein the States are prohibited from laying tonnage duties. A heavy tonnage duty on vessels would as much destroy commerce

and engender those bad feelings among the States against which the Constitution was made to provide as heavy duties upon the imports brought by the vessels. In 12 Wheaton, 439, C. J. Marshall says: "From the vast inequality between the different States of the Confederacy as to commercial advantages, few subjects were viewed with deeper interest, or created more irritation, than the manner in which the several States seemed disposed to exercise the power of levying duties or imposts. From motives which were deemed sufficient by the statesmen of that day, the general power of taxation, indispensably necessary as it was, and jealous as the States were of any encroachment on it, was so far abridged as to forbid them to touch imports or exports, with the single exception which has been noticed. Why are they restrained from imposing these duties? Plainly because in the general opinion, the interest of all would be best promoted by placing that whole subject under the control of Congress." "It is obvious that the same power which imposes a light duty, can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed. If the tax may

be levied in this form by the State, it may be levied to an extent which will defeat the revenue by import, so far as it is drawn from importations into the particular State."

Third. The statutes under which plaintiffs claim are null and void, because they are repugnant to the 2nd clause of section 8 of the United States Constitution, which declares that Congress shall have power "to regulate Commerce with foreign nations, and among the several States, and with the Indian tribes."

No part of the Constitution has been considered of more vital importance than that clause which we now invoke. The dissentions arising among the several States under the articles of confederation in consequence of conflicting commercial regulations, were the primary cause of the convention which made for us that government, under which many sovereignties composed of people of different races, religious and political sentiments, and interested in systems antagonistic and constantly clashing have been made to work in concert and harmony. Chancellor Kent says that before the assembling of the Convention "*interfering regulations of trade*, and interfering claims of territory, were dissolving the friendly attachments, and the sense of common interest, which had cemented and sustained the Union during the arduous

struggles of the revolution ;" and Chief Justice Marshall has said : "The oppressed and degraded state of commerce previous to the adoption of the Constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests ; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties ; but the inability of the federal government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating *the influence of commerce on the prosperity of nations*, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceding from the feebleness of the federal government, contributed more to this great revolution which introduced the present system, than the *deep and general conviction that commerce ought to be regulated by Congress.*"

In 1778 the subject of vesting in Congress the exclusive regulation of commerce was pressed upon Congress by the State of New Jersey, and in 1781, a resolution was presented affirming that "it is indispensably necessary

that the United States in Congress assembled, should be vested with a right of superintending the commercial regulations of foreign states, that none may take place that shall be partial, or contrary to the common interests." And it is a little remarkable that the first proposition to change the old system under the articles of confederation, and adopt a new constitution, came from the Legislature of Virgina, in 1786, in the shape of a resolution to call a convention to *regulate commerce.* And Mr. Madison's resolution to send commissioners to meet other States, declares the object to be " to take into consideration the trade of the United States, to consider how far an uniform system in their commercial regulations may be necessary to their common interests and their permanent harmony."

Those things which in themselves are legal may become unlawful by their effects upon commerce. Thus pilot laws, health laws and quarantine laws, as such, may be enacted by the several States, but the moment they control or regulate commerce, they pass to a point beyond their legal sphere, and contravene the U. S. Constitution. The language of the Supreme Court of the United States, in the celebrated case of Gibbons vs. Ogden—9 Wheaton, 186—is clear upon this subject. In that case Judge Marshall said :

"The acts of Congress, passed in 1796 and 1799, empowering and directing the officers of the General Government to conform to, and assist in the execution of the quarantine and health laws of a State, proceed, it is said, upon the idea that these laws are constitutional. It is undoubtedly true that they do proceed upon that idea; and the constitutionality of such laws has never, so far as we are informed, been denied. But they do not imply an acknowledgement that a State may rightfully regulate commerce with foreign nations, or among the States; for they do not imply that such laws are an *exercise of that power*, or enacted with a view to it. On the contrary, they are treated as quarantine and health laws, are so denominated in the Acts of Congress, and are considered as flowing from the acknowledged power of a State to provide for the health of its citizens. But as it was apparent that some of the provisions made for this purpose, and in virtue of this power, might interfere with and be affected by the laws of the United States, made for the regulation of commerce, Congress, in that spirit of harmony and conciliation, which ought always to characterize the conduct of governments standing in the relation which that of the Union and those of the States bear to each other, has directed its officers to aid in the execu-

tion of these laws ; and has, in some measure, adapted its own legislation to this object by making provisions in aid of those of the States. But in making these provisions, the opinion is unequivocally manifested, that Congress may control the State laws, so far as it may be necessary to control them, for the regulation of commerce.

"It has been said that the Act of August 7, 1789, acknowledges a concurrent power in the States to regulate the conduct of pilots, and hence is inferred an admission of their concurrent right with Congress to regulate commerce with foreign nations, and amongst the States. But this inference is not, we think, justified by the fact.

"Although Congress cannot enable a State to legislate, Congress may adopt the provisions of a State on any subject. When the government of the Union was brought into existence, it found a system for the regulation of its pilots in full force in every State. The Act which has been mentioned, adopts this system, and gives it the same validity as if its provisions had been specially made by Congress. But the Act, it may be said, is prospective also, and the adoption of laws to be made in future, presupposes the right in the maker to legislate on the subject.

"The Act unquestionably manifests an intention to leave this subject entirely to the States, until Congress should

think proper to interpose; but the very enactment of such a law indicates an opinion that it was necessary; that the existing system would not be applicable to the new state of things, unless expressly applied to it by Congress. But this section is confined to pilots within the "bays, inlets, rivers, harbors and ports of the United States," which are, of course, in whole or in part, also within the limits of some particular State. The acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens, may enable it to legislate on this subject, to a considerable extent; and the application of it to the whole subject of commerce, does not seem to the Court to imply a right in the States so to apply it of their own authority. But the adoption of the State system being temporary, being only "until further legislative provision shall be made by Congress," shows, conclusively, an opinion that Congress could control the whole subject, and might adopt the system of the States, or provide one of its own."

We will now proceed very briefly to examine the decisions of the Supreme Court of the United States upon the power of Congress to regulate commerce. The first time the point arose for judicial decision, was in the case of Gibbons vs. Ogden. In that case the Supreme

Court, without a dissenting opinion, decided that the power to regulate commerce was exclusively vested in Congress. "When a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising *the very power that is granted to Congress*, and is doing the very thing which Congress is authorized to do." What is the power vested in Congress? "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself; may be exercised to its utmost extent, and *acknowledges no limitations* other than are prescribed in the Constitution." (9 W., p. 9.) "These acts were cited at the bar for the purpose of showing an opinion in Congress that the States possess, *concurently with the Legislature of the Union*, the power to regulate commerce with foreign nations and among the States. Upon reviewing them, we think they do not establish the proposition they were intended to prove;" (*idem*) "but the power to regulate foreign commerce is *necessarily exclusive*." "But the language which grants the power as to one description of commerce, grants it as to all; and, in fact, if even the exercise of a right, or acquiescence in a construction, could be inferred from contemporaneous and continued assent, it is that of the *exclusive*

effect of this grant.—Judge Johnson's opinion in same case.

The next case is that of Brown vs. State of Maryland, (12 Wheaton, 436,) where the Court decide that a "State law requiring an importer to take a license and pay fifty dollars before he should be permitted to sell a package of imported goods, is in conflict with that provision of the Constitution of the United States, which prohibits a State from laying any impost, &c., and also with the clause which declares *that Congress shall have power to regulate commerce.*"

"It will be seen by examining all the decisions of the Supreme Court upon the subject of regulating commerce, that the most embarrassing point was as to the exclusive power of Congress to regulate commerce. Perhaps no question was ever presented to that Court that gave more difficulty, and yet, notwithstanding the occasional dissenting opinions of Judges, it will be found that the tenor of the decisions has been that the power in Congress is exclusive, and that even where Congress is silent upon any branch of commerce, the States are powerless to act.

We contend then:

1. That the power of Congress to regulate commerce

is exclusive, and that all statutes enacted by the States upon this subject are null and void, whether Congress has acted or not.

2. That when Congress *has regulated any branch of commerce*, the statutes of the States upon the subject regulated, are necessarily null and void. That Congress having passed many laws regulating the subject of *tonnage* duties, the acts of Louisiana imposing tonnage duties are null and void, because contravening that provision of the Constitution vesting this power in Congress, and because in conflict with those acts of Congress (of 1830) declaring that no tonnage duties should be exacted.

1. The power of Congress is exclusive. We have already seen that this point was first presented in the case of Gibbons vs. Odgen, and we have already shown that the Court decided that whether Congress exercised the power of regulating commerce or not, the States were without the power to act. This was the opinion of all the Judges, and upon that bench sat the two wisest and most learned jurists that this country has produced—we of course refer to Chief Justice Marshall, the American Mansfield—and to Judge Story, whose legal productions are alike authority in Westminster Hall and in the courts of our own country. The opinion rendered in that case by Judge

Marshall is said to have been the greatest production of that great man, and after being subjected to the closest scrutiny and investigation by all the Judges that have succeeded him, his judgment in that case remains to this day unshaken. Again in the case of Brown vs. Maryland, (12 Wheaton, 419.) this exclusive power was insisted upon, the opinion was delivered by Chief Justice Marshall, and affirmed all that was decidedin the case of Gibbons, and though there had been change of Judges on the bench, again the opinion was unanimous.

It has been said that in the case of Wilson vs. Blackbird Creek Company, (2 Peters, 245) rendered but two years after that of Brown vs. Maryland, Judge Marshall expressed a different opinion. That opinion is by no means as elaborate as the majority of those of Marshall, and in the few lines he has written upon the subject, it must be conceded he expresses an opinion that seems to conflict with those formerly expressed. But it is said by one of the Judges in the Passenger cases (7 Howard, 283), that Judge Marshall never intended what was contended for in this case, and this seems quite certain, from the fact that in the later case of Miln vs. New York (11 Peters, 102), Judge Marshall's opinion was the same as that expressed in the case of Gibbons vs. Ogden, and

Brown vs. Maryland. On this subject Judge Story says: (11 Peters, p. 161) "In this opinion, I have the consolation to know that I had the entire concurrence, *upon the same grounds*, of that great constitutional jurist, the late Mr. Chief Justice Marshall. Having heard the former arguments, (in the same case) his deliberate opinion was that the act of New York was unconstitutional, and that the present case falls directly *within the principles established in the case of Gibbon vs. Ogden*, (9 Wheaton, 1) and Brown vs. State of Maryland 12 Wheaton, 419." So much for the charge of inconsistency against Judge Marshall.

The next case in which this point was presented, was that of the city of New York vs. Miln 11 Peters, 102. This was a most extraordinary case. Judge Wayne in the passenger case (7 Howard, 430) explains how the decision which was read as that of the majority, was in fact, that of a minority. The statement is too long to be copied here, but the Court will find it novel and interesting. Upon the point in question, Judge Wayne says: "In the discussion of the case, however, the nature and exclusiveness of this power in Congress to regulate commerce was much considered. There was a divided mind among us about it. *Four of the Court being of the*

opinion, that according to the Constitution and decisions of this Court in Gibbon vs. Ogden, and in Brown vs. Maryland, the power in Congress to regulate commerce was exclusive, three of them thought otherwise." And among the four was Judge Story. So we claim this as also being in favor of our views.

In the License cases 5 How. 504, rendered in 1846, those Judges who wrote opinions seem to decide against the exclusiveness of the right of Congress to regulate commerce, but in the great cases known as the Passenger cases decided in 1848, the whole subject was reviewed—all the Judges rendered separate and elaborate opinions, and the majority decided in this last case as all the Judges had decided in the first case, that the power of Congress was exclusive, and that the States could regulate commerce in no way and under no circumstances.

We now come to that case upon which plaintiffs seem almost exclusively to rely. Hitherto the question, of the exclusiveness of the power of Congress to regulate commerce was regarded as a whole. Was the power exclusive, or was it not, was the question, with those great and venerable jurists—whose names give lustre and renown to our jurisprudence, but the present Supreme Court [redacted] decide that in some

7

12 Howard 299

cases Congress has exclusive power, and [illegible] it has not, and it leaves to others the delicate duty of drawing the line. In this case, as we have before observed, the two oldest Judges on the bench, (McLean, appointed in 1829, and Wayne in 1835), the sole surviving contemporaries of Judge Marshall—Judges before whom almost all the great constitutional cases were argued—record their earnest protests. In all the cases to which we have referred, the necessity of regarding the power as a unit is earnestly insisted upon ; in none of the dissenting opinions even do we find a suggestion that the power to regulate commerce, should be divided; which it was proposed to the Convention to divide it, the proposition was at once voted down. See page 35 of this brief. Judge Marshall says : (9 W. p. 7) "It has been truly said that commerce, as the word is used in the Constitution, is a unit, every part of which is indicated by the term."

In the case of Brown vs. Maryland, the Court said : "It may be doubted whether any of the evils proceding from the feebleness of the federal government, cotributed more to that great revolution, which introduced the present system, than the deep and general conviction that c[illegible]ght to be regulated by Congress. It is not, therefore, matter of s[illegible]

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We believe it to be quite unnecessary to cite further authorities on this subject. In all decisions, from the first to that rendered by Judge Curtis, the Judges have been unanimous in speaking of the power to regulate commerce as a thing indivisible, and that the very existence of the Union depended upon its being removed from the States to the National Legislature. As the regulation of this subject was the cause of our Union so there is danger that if the power is restored to the States contentions will arise that will threaten its

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existence. But, after all, Judge Curtis [redacted] base the legality of the State statute upon the consent and action of Congress. He says: "It is the opinion of a majority of the Court that the mere grant to Congress of the power to regulate commerce, did not deprive the States of power to regulate pilots, and that although Congress has legislated on this subject, its legislation *manifests an intention*, with a single exception, *not to regulate this subject*, but to leave its regulation to the several States. To these precise questions, *which are all we are called on to decide, this opinion must be understood to be confirmed.*" [redacted].

On this point we have cited no State decisions, because we have believed that the Supreme Court of the United States is the most fit tribunal to decide questions growing out of the U. S. Constitution, but we think all the State decisions cited in this brief will support us in our views on this subject. See 7 R. R. 214.

2. Whatever doubt may exist in some minds [redacted] the exclusive power of Congress to regulate commerce, and on the inability of the States to act, even where Congress has not legislated, there can be no doubt that when Congress

has legislated upon a given commercial subject, that then the States are without power to act.

The State of Louisiana, in the statutes invoked by plaintiffs, have made a regulation affecting commerce when they laid a duty on vessels plying between the sveeral States and trading with foreign nations.

Judge Marshall, in speaking of commerce, says :

"The subject to be regulated is commerce, and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the

ports of the other, and be confined to prescribing rules for the conduct of individuals in the actual employment of buying and selling, or of barter." (9 W., p. 4.)

And in the case relied upon by plaintiffs, (12 How. 298,) the Court say "that the power to regulate commerce includes the regulation of navigation, he considered settled." "The power to regulate navigation is the power to prescribe rules, in conformity with which, navigation must be carried on. It extends to the persons who conduct it, as well as to the instruments used." And Judge Grier, (7 How.. 459,) says: "It is a just and well settled doctrine established by this Court, that a State cannot do that [illegible] which she is forbidden to do directly. If she cannot levy a duty or tax from the master or owner of a vessel, *engaged in commerce*, graduated on the tonnage or admeasurement of the vessel, she cannot effect the same purpose by merely changing the ratio, and graduating it on the number of masts, or of mariners," &c., &c.; but it is unnecessary to quote more authorities, to show that the State cannot act where Congress has legislated on a branch of commerce, and that our State has in the acts of 1855 and 1856, attempted to regulate commerce by taxing vessels engaged in commerce.

It only remains to be seen whether Congress has legislated upon tonnage duties.

By reference to the Statutes at Large it will be found that this subject has been under the control of Congress ever since its first session in 1789. Acts affecting tonnage were passed in 1789, 90, 99, 1803, 4, 5, 12, 16, 17, 20, 21, 22, 23, 26, 27, 28—and in 1830 (4 Stat. at Large, p. 425) they enacted the following statute :

"An Act to repeal the tonnage duties upon ships and vessels of the United States, and upon certain foreign vessels.

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled. That from and after the first day of April next, no duties upon the tonnage of the ships and vessels of the United States, of which the officers and two-thirds of the crew shall be citizens of the United States, shall be levied or collected ; and all acts or parts of acts imposing duties upon the tonnage of ships and vessels of the United States officered and manned as aforesaid, so far as the same relate to the imposition of such duties, shall, from and after the said first day of April next, be repealed.

"Sec. 2. And be it further enacted, That from and after the said first day of April next, all acts and parts of

acts imposing duties upon the tonnage of the ships and vessels of any foreign nation, so far as the same relate to the imposition of such duties, shall be repealed: *Provided*, That the President of the United States shall be satisfied that the discriminating or countervailing duties of such foreign nation, so far as they operate to the disadvantage of the United States, have been abolished."

And since that period to this date they have continued to regulate the subject.

The power of Congress then is vested in Congress, and when acted upon by Congress is exclusive. (3 Cowan 716, 719: 14 Peters 574.) It has been acted upon, and therefore in questions of tonnage duties State legislation upon the subject is null and void.

We have but one more point to present to this Court, and we close our argument, hastily prepared as it is and doing but poor justice to the great constitutional questions which it pretends to discuss.

Fourth. We contend that the State laws relied on by plaintiffs are void, because in violation of the 6th clause of section 9 of the U. S. Constitution, which declares that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another: *nor shall vessels bound to, or from, one State be obliged to enter, clear or pay duties in another.*"

The statement of this proposition contains the best argument. If the imposition created by the State statutes are duties, as we think we conclusively shew, (on pages 10 et seq. of this brief,) then is the charge imposed by the statutes in conflict with this clause of the Constitution—for our charter, filed in evidence, proves that our steamships ply between the ports of Louisiana, Texas and Florida. Our vessels bound from Florida and other States to Louisiana are compelled to pay duties under the acts of 1855 and 1856.

But these statutes also give a preference to the ports of all the States on the Mississippi river over the ports of the States bordering on the Gulf. The Harbor Master act expressly excepts all vessels engaged in the river trade, (Acts 1856, p. 206, sec. 5,) and the Port Warden act imposes the duty only upon vessels coming from sea, (Acts 1855, p. 489, sec. 6.)

It is deemed unnecessary to cite authorities to support propositions so obvious as these, and we will therefore dismiss the subject with the remark that the Supreme Court of South Carolina decided their statutes to be illegal for the reasons we have last stated. The Court in that case say: "The discrimination made in this ordinance between vessels owned in and be-

longing to this State, and steadily plying and trading within the same, and vessels trading and performing regular successive voyages from the adjoining States of North Carolina and Georgia, is liable to the very grave objection arising under the 5th part of the 9th section of the 1st Act of the Constitution of the United States, as recognized and enforced in Chapman vs. Miller. For certainly it cannot be said this is not giving a 'preference to the ports from one State over those of another,' nor that 'vessels bound to or from one State are not required to pay duties in another.'"

We are confident that the attention which we are sure your Honors will give to the decisions that we have cited, and that the importance of these cases demand, will satisfy this honorable Court that the statutes under which plaintiffs claim, are null and void, because, contravening several prohibitory provisions of the United States Constitution.

~~HENRY J. LEOVY,~~
~~Counsel for Defendants.~~

L. N. Saloman
Counsel for
Plff in error.

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S. M. Salomon
Counsel for
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